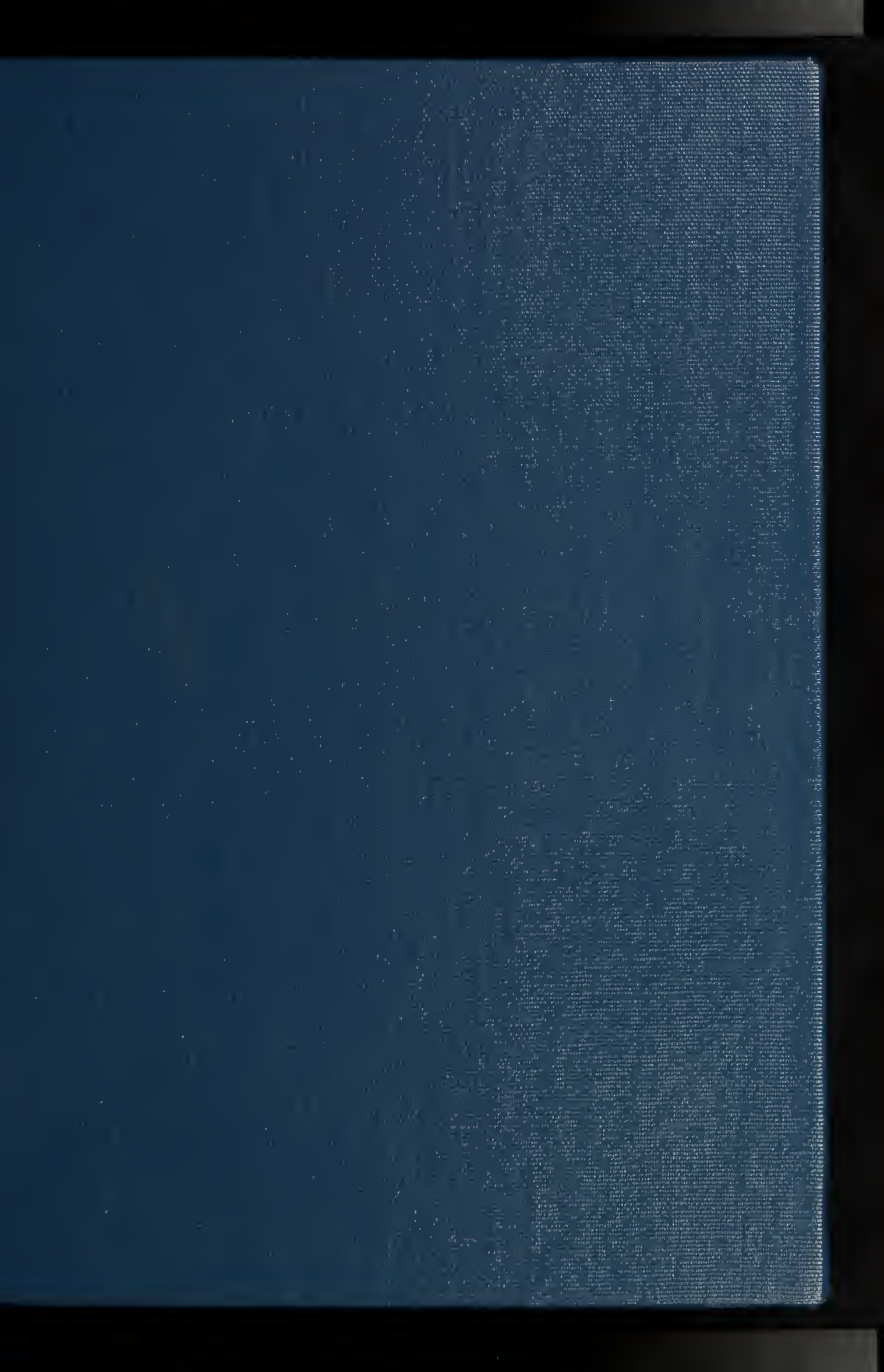

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 17
NUMBER 1
JANUARY 1985

Chief Judge Charles A. Moye, Jr.

Judicial Conference Subcommittee Chairman Explains Process for Setting Judgeships

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William H. Timbers and J. Blaine Anderson and District Judges

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See MOYE, page 4

Satellite Seminar on Crime Control Act Set

District judges and other personnel in 68 districts, as well as circuit judges, have been notified of a Center-sponsored satellite video seminar on the Comprehensive Crime Control Act of 1984. The seminar, to be broadcast Jan. 17 in 29 cities, will present an overview of the provisions of the legislation that most affect district judges and supporting personnel.

The Center will make videotapes of the program available to all personnel as soon as possible.

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See ETHICS, page 10

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The Chief Justice said of Mr. Foley, "All can join in wishing Bill Foley much happiness and good health in the years ahead. His colleagues and friends are well aware

See FOLEY, page 2

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In the following interview, Chief Judge Moye describes the process for making the federal courts' biennial recommendation to Congress for additional judgeships and details the factors considered by the Subcommittee on Judicial Statistics in initiating that recommendation. Judge Moye has been a member of the statistics subcommittee since 1975 and its chairman since 1980.

Chief Judge Moye holds undergraduate and law degrees from Emory University.

You've been a member of the Judicial Conference's Subcommittee on Judicial Statistics since 1975 and have chaired that subcommittee since 1980. Would you briefly describe the subcommittee's responsibilities?

The Subcommittee on Judicial Statistics, of which Circuit Judges William H. Timbers and J. Blaine Anderson and District Judges

Chief Judge Charles A. Moye, Jr.

James P. Churchill and Tom Stagg are also members, has two basic functions. The first and best known is making biennial recommendations to its parent committee, the Committee on Court Administration, with respect to the needs for additional Article III judgeships and providing the statistical and factual bases to support the requests. The parent committee then acts on the subcommittee's recommendations and transmits its own recommendations to the Judicial Conference, which acts on them and makes appropriate recommendations to Congress. The other responsibility is a general oversight of the statistical functions of the Statistical Analysis and Reports Division (SARD) of the Administrative Office. The subcommittee counsels staff of that division with respect to reports concerning the judiciary and its components. Where changes in the statistical system are required and are of a relatively minor nature, the matter goes no further. Where the changes are of a substantial nature, the subcommittee makes its recommendations with respect to such changes to the Committee on Court

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Judge Hastings, who was tried and acquitted on charges of bribery and obstruction of justice in 1983, was the subject of a complaint to the Eleventh Circuit Judicial Council. Under the 1980 legislation, the Judicial Councils Reform and Judicial Conduct and Disability Act, 28 U.S.C. § 372(c), a circuit judicial council can take sanctions—short of removal—against a judge found guilty of misconduct in office. The complaint against Judge Hastings was related both to the criminal charges on which he was acquitted and to conduct revealed during the criminal trial.

Judge Hastings sued in the District Court for the District of Columbia, claiming that the investigation of

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Apart from dollar savings, persons who have been called for jury duty will go away with a much better attitude toward the court system if they have had their time used efficiently. It is difficult to speak of jury service as a solemn obligation of citizenship if people are called to the courthouse only to have their time "frittered away" watching TV and reading old magazines—or just waiting to be called.

Every court that is not using a jury pool method owes it to the system to move in that direction.

Taped Programs Explain Bankruptcy Act Amendments

The Center recently produced two video/audio programs on the 1984 bankruptcy amendments. "Jurisdiction Under the 1984 Bankruptcy Act," featuring Professor Lawrence P. King of New York University Law School, is a 2-hour and 29-minute program designed primarily to help district judges understand the jurisdictional and structural changes to title 28 resulting from the 1984 legislation. It describes "core" and "non-core" proceedings, withdrawal, abstention, transfer of cases, jury trials, and bankruptcy appeals. (The catalog number for the video program is VJ-066, for the audio, AJ-0679.)

"The 1984 Bankruptcy Amendments," featuring Professor King and George B. Triester, is a 2-hour and 40-minute program that reviews the jurisdictional and structural amendments described above, but also discusses the major amendments to the bankruptcy code made by the 1984 legislation. The presentation presumes a working knowledge of title 11 and of the relevant bankruptcy provisions of title 28. Substantive provisions discussed include executory contracts

See VIDEO, page 10

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FOLEY, from page 1

of the many contributions he has made to the federal courts throughout the years. His strong leadership will be missed."

Applicants wishing to be considered for this position should file a letter application and curriculum vita with the Chief Justice of the United States, Supreme Court of the United States, Washington, DC 20543. To assure consideration, applications should be received by Feb. 1, 1985.

The salary of the director is equivalent to that of a federal district judge, currently $76,000 per year.

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The study, cosponsored by the Judicial Administration Division's Lawyers' Conference and the National Conference of Federal Trial Judges, included a poll of attorneys who practice in four federal district courts. More than 3,400 lawyers in the Northern District of California, the Western District of Texas, the Western District of Missouri, and the Northern District of Florida were sent questionnaires; nearly 55 percent responded.

Eighty-five percent of the respondents believed that involvement of a federal judge in settlement proceedings increases the chances of achieving a settlement. But many of those favoring such judicial intervention thought it should come from a judge other than the one who would try the case if no settlement were reached.

Magistrate Wayne D. Brazil (N.D. Cal.), who was a professor at Hastings College of the Law and supervised the survey for the Lawyers' Conference's Federal Courts Committee, said that the survey's findings might have significant practical benefits if "judges begin to develop the capacity to predict how lawyers in different situations will react to different judicial approaches to settlement."

Plaintiffs' lawyers seemed to favor slightly more intervention than did defendants' attorneys. Two-thirds of plaintiffs' lawyers felt that a judge who thinks a settlement is unfair should warn a party about to agree to it, whereas less than one-third of the defense bar felt that the judge should issue such a warning. ■

CALENDAR

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1985 Circuit Judicial Conferences

Nov. 3–7	San Juan, P.R.
Sept. 4–6	Hershey, Pa.
Oct. 6–8	Hershey, Pa.
June 27–29	Homestead, W. Va.
May 19–22	Austin, Tex.
May 14–18	Louisville, Ky.
May 12–14	Chicago, Ill.
July 23–26	Little Rock, Ark.
May 28–31	Tucson, Ariz.
Sept. 4–7	Tulsa, Okla.
May 12–15	Miami, Fla.
May 18–21	Williamsburg, Va.
May 17	Washington, D.C.

Jan. 21–22 Judicial Conference Committee on Court Administration

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Eleventh Circuit	May 12–15	Miami, Fla.
D.C. Circuit	May 18–21	Williamsburg, Va.
Federal Circuit	May 17	Washington, D.C.

CALENDAR

Jan. 6–12 Seminar for Newly Appointed District Judges

Jan. 7–8 Judicial Conference Committee on the Operation of the Jury System

Jan. 10–11 Judicial Conference Committee on the Administration of the Bankruptcy System

Jan. 14–15 Judicial Conference Committee on the Administration of the Criminal Law

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MOYE, from page 1

Administration for subsequent transmittal to and action by the Judicial Conference. The subcommittee also has the responsibility for developing improvements in the methods of assessing the needs for additional judgeships and also in general statistical methods. To that end, it works not only with the AO and the SARD but also with the Federal Judicial Center, particularly the Research Division.

You mentioned developing the judgeship requirements for the federal system, a process that remains a mystery to many judges. Can you give a thumbnail description that will help to clarify the process for them?

First, it must be understood that judgeships are created by congressional action and not by the judiciary. Therefore, to work backwards, a request for additional judgeships must be made to Congress by the Judicial Conference of the United States. The Judicial Conference acts on the basis of recommendations to it by the Court Administration Committee, which has delegated to the Subcommittee on Judicial Statistics the responsibility for making initial recommendations to it. While, formerly, requests for judgeships were made on a quadrennial basis, since 1980 they have been made on a biennial basis, with requests from the Judicial Conference going to the Congress following Conference action at its fall meeting in even years. Therefore, the recommendations from the Court Administration Committee to the Judicial Conference on this subject are formulated at its summer meeting in even years, and the recommendations of the subcommittee are formulated at its spring/summer meeting, also in even years.

To arrive at those recommendations, the subcommittee, beginning in the summer of each odd year, seeks from every Article III court its request, if any, for additional judgeships. The subcommittee asks each court to furnish it with the information that court believes relevant to its request. In the process, the subcommittee forwards to each court a questionnaire seeking answers to basic questions needed to evaluate a request. The subcommittee also solicits from each court information on any unique circumstances affecting the court that indicate a need for special consideration by the subcommittee.

Following receipt of answers to the questionnaire and any other information submitted, the subcommittee considers, at its November/December meeting in each odd year, the information received from the courts and the analysis prepared by the SARD and arrives at tentative recommendations. It then informs the courts involved of its tentative recommendations and submits them to the judicial council for each circuit, soliciting a response from the council with respect to the requests by the courts in its circuit. The subcommittee considers that additional information at its spring/summer meeting (in even years) and formulates its recommendations on the courts' requests in time for transmittal to the Court Administration Committee.

The subcommittee's schedules for court of appeals judgeships and for district court judgeships are identical.

"In cases in which that backlog is so serious that we feel that it would impede the ability of the active judges of the court to manage the court's caseload, we will consider the authorization of temporary judgeships."

You mentioned getting information from SARD as well as from the individual courts. With these data in hand, what factors are considered by your subcommittee in determining judgeship needs?

The most important factor considered by the subcommittee is a district court's weighted caseload per authorized judgeship. The subcommittee has, through long experience, found that a weighted caseload of more than 400 filings per annum— civil and criminal— indicates a need for close scrutiny by the subcommittee. That is merely the beginning. The subcommittee considers in detail other factors such as utilization of magistrates, number of divisions, geographical location of the divisions, the complexity of cases, and all other particular matters that have been brought to its attention.

Generally, the subcommittee has found that absent unusual circumstances, a caseload of substantially fewer than 400 filings per judgeship will not warrant the recommendation of an additional judgeship. Similarly, a weighted caseload substantially in excess of 400 will indicate the need for additional district court judgeships. This factor, of course, is easier to apply in multiple-judge districts than it is in smaller districts, where, for example, the subcommittee would have difficulty—in a theoretical one-judgeship district—recommending an additional judgeship if the weighted caseload were, let's say, 450.

We are currently evaluating predictors of need for additional court of appeals judgeships. We are thinking in terms of about 300-plus dispositions on the merits as the starting point for consideration comparable to the figure of 400 weighted filings we use for district courts. Other factors, principally complexity of the mix of cases, necessarily enter into our final recommendation.

See MOYE, page 5

MOYE, from page 4

The ultimate basis of the subcommittee's final recommendation for each court—court of appeals or district court—is its best judgment, on an individual-court basis, of the entire amalgam of factors affecting that court.

You mentioned a standard of 400 for a weighted caseload. How was that standard formulated? How did you arrive at that number?

That particular factor is an empirical one based on the observations of the members of the subcommittee. Its validity has been seriously considered at nearly all of our meetings since I have been a member. It goes back to a time before I was a member of the subcommittee and originates in an empirical analysis of workload in the Eastern District of Louisiana by Judge Alvin Rubin, who formerly was a member of the subcommittee. The subcommittee, as I have said, has considered it often; we have also asked the Federal Judicial Center's Research Division to consider the figure. We have recent research by Barbara Meierhoefer of the Research Division that tends to validate the figure. Generally, it is a figure with which all the members of the subcommittee feel comfortable as a starting point. Again, I must emphasize that it is only a starting, and not an ending, point.

"The most important factor considered by the subcommittee is a district court's weighted caseload per judgeship."

I should mention that Judge Rubin and John Shapard, also of the Research Division, are providing the subcommittee with much welcome assistance in its consideration of court of appeals judgeship predictors.

What about backlog or pending caseload? Does that ever come into play?

It does. We have found courts that have a substantial backlog where the current filings would not indicate a need for an additional judgeship. In cases in which that backlog is so serious that we feel that it would impede the ability of the active judges of the court to manage the court's caseload, we will consider the authorization of temporary judgeships.

Chief Judge Charles A. Moye, Jr.

The subcommittee defines a temporary judgeship as one created for a minimum period of five years, which will lapse with the first vacancy on the court thereafter. We are aware that there have been suggestions that the only valid temporary judgeship is one that lapses only with the retirement of the incumbent of that particular position. The latter definition makes it difficult for the subcommittee to use the temporary judgeship concept for the particular function for which it is conceived to be useful. In our recent recommendations to the Court Administration Committee with respect to temporary judgeships, we specified that the recommendations were based on the definition of a temporary judgeship lapsing with the first vacancy on the court after five years. We, of course, have no control over whether that definition will be accepted by the Congress. The Judicial Conference, however, has accepted our definitions.

You mentioned that you consider the use of magistrates in formulating judgeship requirements. Could you provide a little more detail on that?

This factor is only now entering into our deliberations. For some time it has been the feeling of the Judicial Statistics Subcommittee—as well as of the Court Administration Committee, of which I am a member—that problems will be encountered if the ranks of Article III district judges continue to increase at the present rate. Many voices, within and without the judiciary, are emphasizing the validity of this feeling. The great prominence that is given to alternative dispute resolution mechanisms, to the elimination of diversity jurisdiction, and so forth leads us to the conclusion that this sentiment is shared by virtually the entire federal judiciary.

Therefore, it has seemed to us that one avenue that ought to be explored is the more effective, or greater, use of other personnel within the judicial structure. It is entirely possible that, sometime in the future, the federal practice will be such that magistrates will be handling most of the pretrial work in civil as well as in criminal cases, delivering to the Article III judge a pretrial order that the magistrate has formulated after supervision of discovery, in conference with counsel in a manner and form that has been approved by the judge. The district judge could then examine the pretrial order to determine what further action, if any, on his

"A well-briefed request for judgeships at an early stage is the most helpful thing possible from any court."

See MOYE, page 6

MOYE, from page 5

part was necessary prior to trial and take such action or proceed to trial. This would be somewhat analogous to the procedure in which English barristers receive a brief from English solicitors and go to trial thereon.

Judge Walter Hoffman's comments on page 4 of the December *Third Branch* on the lack of problems encountered by visiting judges in trying cases already pretried in another district would seem to lend some validity to this concept.

Of course, magistrates would be under the supervision of the district judges at all times, and discovery supervised by such magistrates, or other activities undertaken by them, would be in a form acceptable to the district judges. Such optimum utilization of magistrates would ultimately reduce some of the pressure for the creation of additional Article III district judgeships—how much, of course, we do not know.

But I emphasize that we are only in the very beginning of the process of analyzing the extent to which the workload needs of a particular court can be handled through the more effective utilization of magistrates rather than the creation of additional Article III district judgeships.

Some observers feel that the judiciary's effort to hold down the increase of judgeships is a commendable policy but that the judiciary may have been too hard on itself in recent years. How does your subcommittee balance the desire to confine growth against the rising demand for court services?

The subcommittee considers each court on an individual basis, and it attempts to make sure that each court has an adequate Article III complement to serve its needs without creating an excess. We have no implements to give us this balance on a statistical, or other precise, basis. It winds up, as I see it, as the empirical judgment of the subcommittee as a whole. We have been made aware of no general feeling that the recommendations of the subcommittee are too parsimonious across the board. We do occasionally get indications from particular courts of dissatisfaction with particular recommendations by the subcommittee. It is our hope that such courts will make their feelings known to us during the interval following the receipt of our tentative recommendations so that we have time to reconsider those courts' presentations prior to making our final recommendations.

"The ultimate basis of the subcommittee's final recommendation for each court . . . is its best judgment . . . of the entire amalgam of factors affecting that court."

You talked about a number of factors, such as weighted caseloads, complexity, and so on. What about the presence of active senior judges? Is that taken into account?

To an extent, it is necessarily taken into account in our judgment as to the effect to be given to the weighted caseload factor. Most often we have found, however, that individual courts do not wish unduly to expand the number of Article III judges where the caseload is being handled adequately by senior judges. Generally, we are of the opinion that the active-judgeship complement of a district ought to be able to handle the workload of that district without great discomfort. It is therefore in relatively few cases that the senior judge factor becomes decisive.

In your last report to the Conference, there was a discussion of the impact of diversity cases. You indicated that if these cases were eliminated, your request for judgeships would decrease by a large amount. Do you think it likely that similar annotations of other sources of judgeship needs will be made in the future?

Perhaps. At the present, we have no such intention.

I'd like to explain why we did that with respect to diversity jurisdiction. First, it is the position of the Judicial Conference that diversity jurisdiction ought to be eliminated. This results from recommendations coming to the Conference from the Subcommittee on Federal Jurisdiction of the Court Administration Committee and the subsequent recommendations by the Court Administration Committee. Therefore, we have not considered, with respect to this item, that the Subcommittee on Judicial Statistics was itself entering a new field. Rather, we are providing the statistical basis for the stated position of the Judicial Conference; we conceive that to be one of our functions. If similar situations arise in the future, we will approach it from the same viewpoint. But, I emphasize, it is not the statistics subcommittee that has adopted a position with respect to diversity jurisdiction. We are simply providing statistics with respect to a stated position.

Earlier, you noted that the federal courts cannot continue to grow at their present pace. Is there a point beyond which the federal judiciary should not grow; is there a point at which alternative solutions must be implemented?

There may be. We are not in a position now even to foresee or, certainly not, to forecast such a point. Generally, we know that in all organizations efficiency decreases with growth.

You talked about courts that might not agree with your decisions as to numbers of judgeships. How can courts help the subcom-

See MOYE, page 8

Eleventh Circuit Judge Johnson Receives Devitt Service Award

Judge Frank M. Johnson, Jr., of the Eleventh Circuit has been named the recipient of the annual Devitt Distinguished Service to Justice Award. Judge Johnson was recognized for his "quiet courage" in pioneering "judicial intervention to enforce constitutional guarantees" and for "leading the peaceful judicial revolution in the states of the former Confederacy." He was also cited for his competence as both a trial and an appellate judge and for his work in improving judicial administration.

Judge Frank M. Johnson, Jr.

The Devitt Award was established in 1982 by the West Publishing Company "to bring public recognition to the contributions to justice made by Federal Judges and to herald their dedication and achievements." It is named for Judge Edward J. Devitt of the U.S. District Court for the District of Minnesota, who served on the selection committee along with Supreme Court Justice Lewis F. Powell, Jr., and Chief Judge James R. Browning of the Ninth Circuit.

Previous recipients were Judge Albert B. Maris (3rd Cir.) and Judge Walter E. Hoffman (E.D. Va.). Chief Justice Warren E. Burger was honored with a special award in 1983. ■

Positions Available

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* * *

Deputy Clerk, Supreme Court of the United States. Salary from $30,549 to $42,928. Assists in preparation of Court's Order Lists and *in forma pauperis* case Conference Lists; processes emergency applications and drafts orders; corresponds and consults on court practice and procedure. Requires law degree, membership in a state bar, and at least two years of experience in a court or a management position. Experience as a deputy clerk in an appellate court with supervisory experience and/or management training desirable. To apply, send standard form 171 by Jan. 25, 1985, to James A. Robbins, Personnel and Organizational Development Officer, Supreme Court of the United States, Room 3, Washington, DC 20543.

* * *

Chief Deputy Clerk, U.S. District Court for the District of Connecticut (New Haven). Salary from $25,489 to $42,928. Requires bachelor's degree in business or public administration, political science, criminal justice, law, or management. Also requires history of progressively responsible administrative, professional investigative, or technical job assignments; prior court experience preferred. To apply, send resume by Jan. 25, 1985, to Clerk, U.S. District Court, P.O. Box 1206, New Haven, CT 06505.

* * *

Federal Public Defender, Middle District of Tennessee (Nashville). Salary of $59,760. Provides federal criminal defense services, administers an office, and supervises staff. Requires law degree and membership in a state bar. Significant federal criminal trial experience, ability to administer an office effectively, reputation for integrity, and commitment to the representation of those unable to afford counsel are desirable. To apply, obtain application form from Billie Jo Hastings, Acting Clerk, U.S. District Court, 800 U.S. Courthouse, Nashville, TN 37203-3869. Completed applications must be received by Jan. 15, 1985.

* * *

Assistant to the Circuit Executive, District of Columbia Circuit. Salary from $25,366 to $36,152, depending on qualifications. Requires undergraduate degree and work experience that clearly demonstrates administrative and managerial capabilities. Graduate degree in management, public administration, judicial administration, or law is highly desirable. To apply, send application by Feb. 1, 1985, to Charles E. Nelson, Circuit Executive, U.S. Court of Appeals, 4826 U.S. Courthouse, Washington, DC 20001.

EQUAL OPPORTUNITY EMPLOYERS

MOYE, from page 6

mittee—what can they do to aid you in your efforts?

The best help that each court can give is to prepare and submit, as early as possible following our initial request, a complete profile of the court—basically following our questionnaire—and to give the matter at that point the court's careful attention. That is the time when the court is in the best position to develop the factual basis for its request. While the subcommittee has access to the statistical information in the SARD, that division does not have all the information of a local or particular nature that may be important to our recommendations. A well-briefed request for judgeships at an early stage is the most helpful thing possible from any court.

Are you trying to move away from roving judgeships—a judge for more than one district?

We are, and we have been quite successful. When the judiciary was smaller, I am sure that roving judgeships—judgeships crossing district lines—were a useful device. There is no longer any single-judge district in the country, and even in those districts in which roving judgeships have existed in the past, there is no longer a need that cannot be met by the judges assigned to individual districts.

Roving judgeships substantially skewed the statistical basis for determining judgeships. We found that it was difficult to allocate filings on a per-judgeship basis where roving judgeships existed. When we did so it was on an arbitrary 50/50 or other appropriate percentage basis, and, in many cases, we found that a roving judge might be a de facto full-time judge or almost full-time judge in a single district. Therefore, from the viewpoint of developing a rational statistical basis for additional judgeships, the subcommittee prefers to do so on an individual-district basis and has, therefore, in several cases, recommended the elimination of roving judgeships and the assignment of a roving judge to a particular district.

There is sometimes a great deal of criticism about the creation of judgeships after the Judicial Conference finishes its recommendations. Would you care to comment on that process?

The subcommittee takes the position, and, I believe, rightly, that that is not its affair and that it would be unwise for it to state any position with respect thereto. There is a separation between the Congress and the judiciary. Congress is the judgeship-creating agency and not the judiciary. And while, on a statistical basis, we may individually have some question with respect to certain situations, such as those you describe, we have no position on them.

You talked about the fact that roving judgeships sometimes tend to skew some of your statistical bases. Are there problems with the statistics that are collected? Do you hear any criticisms of them? Are changes needed?

The most general criticism we hear is that the present weighted caseload table doesn't adequately reflect some particular type of case that may constitute a substantial part of a district's caseload. The 1979 weighted caseload table is currently our best statistical device for evaluating the overall qualitative and comparative caseload of any court. The subcommittee is thoroughly aware, however, that the weighted caseload table is based upon a single survey in 1979 by the Federal Judicial Center that encompassed only 100 district judges. That survey is used by us in preference to the previous one, which is now well over 10 years old. There have been some more recent analyses of case weights, which indicate that the 1979 table is generally reliable for the broad purposes for which we use it. When the subcommittee authorized that survey in 1979, it was on the basis that the survey be so designed that should additional segments of the judiciary be surveyed subsequently the results would be compatible. So far, our information from the Center has indicated that the weighted caseload table is sufficiently accurate for our purposes, and we have no desire unnecessarily to refine it because that necessarily means a substantial impingement upon judgeship time. The 100 judges who took part in the 1979 survey were asked to keep accurate records of their time, by particular case, for a period of three months. That was a very substantial dedication of judgeship time and we do not wish to repeat it until it becomes more apparent that it is necessary.

Is there anything else you would like to add?

I think I pretty well covered what I had wanted to say. I have emphasized, and will do so again, that the recommendations by the subcommittee are not automatic, statistically derived crosslines figures. We use statistics as a starting point to conserve the efforts of the subcommittee in the analysis of information. We've done this over such a period of years that we are confident that we are pretty well in range when we start our consideration of a particular court. But frequently there have been occasions on which the subcommittee has been activated by a court's expression or justification of a need not apparent from the statistics themselves. The careful attention of the court, particularly of the chief judge, during the period immediately following the request from the subcommittee in the summer of even years—and the careful preparation or documentation of a request, if there be a request, for additional judgeships—would be of the utmost assistance to the subcommittee. ■

PERSONNEL

Appointments

Charles E. Wiggins, U.S. Circuit Judge, 9th Cir., Oct. 16

Richard F. Suhrheinrich, U.S. District Judge, E.D. Mich., Oct. 23

James H. Jarvis II, U.S. District Judge, E.D. Tenn., Oct. 30

Juan R. Torruella, U.S. Circuit Judge, 1st Cir., Nov. 1

Charles R. Norgle, Sr., U.S. District Judge, N.D. Ill., Nov. 1

Illana D. Rovner, U.S. District Judge, N.D. Ill., Nov. 1

Elevations

Harold A. Baker, Chief Judge, C.D. Ill., Nov. 27

Harold M. Fong, Chief Judge, D. Hawaii, Nov. 30

Owen M. Panner, Chief Judge, D. Or., Oct. 20

Juan M. Perez-Gimenez, Chief Judge, D.P.R., Oct. 30

Richard M. Bilby, Chief Judge, D. Ariz., Nov. 30

Correction

Date of Truman M. Hobbs's elevation to Chief Judge, M.D. Ala., is Oct. 18.

Senior Status

C. A. Muecke, U.S. District Judge, D. Ariz., Nov. 30

Death

J. Waldo Ackerman, Chief Judge, C.D. Ill., Nov. 23

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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Administrative Office of the United States Courts

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Charles W. Nihan, Deputy Director

Mediation Procedure Used In W.D. Wash. Described

The Center recently published *Mediation in the Western District of Washington,* which describes an innovation applied in the Western District of Washington for mediation of selected civil cases. The report, written by Professor Karl Tegland of the University of Washington School of Law, is the second in a collection entitled *Innovations in the Courts: A Series on Court Administration.*

In an attempt to alleviate a growing backlog of cases, the U.S. district court and the local federal bar association in the Western District of Washington jointly developed a procedure by which judges may refer civil cases to attorneys who serve as mediators without compensation. This procedure is embodied in local civil rule 39.1.

The report, based on interviews with judges, clerks of court, and attorneys, focuses on both the codified procedure and the manner in which the procedure operates.

Copies of the report can be obtained by writing to the Center's Information Services Office, 1520 H St., N.W., Washington, DC 20005. ■

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Atwood, Barbara Ann. "Domestic Relations in Federal Court: Toward a Principled Exercise of Jurisdiction." 35 *Hastings Law Journal* 571 (1984).

✔Bazelon, David. "The Insanity Defense: Symbol and Substance." Speech to the American Academy of Psychiatry and the Law, Nassau, Bahamas, Oct. 27, 1984.

Burger, Warren E. "The Judiciary: The Origins of Judicial Review." 54 *National Forum* 26 (1984).

Goldberg, Arthur J. "Regulation of Hostile Tender Offers: A Dissenting Review and Recommended Reforms." 43 *Maryland Law Review* 225.

Goleman, Daniel. "Studies of Children as Witnesses Find Surprising Accuracy." *New York Times,* Nov. 6, 1984, p. C1.

Greene, Harold H. "AT&T Divestiture and Consumers." 5 *University of Bridgeport Law Review* 251 (1984).

Heflin, Howell, and William B. Enright. "Should Lawyers Question Prospective Jurors?" 70 *ABA Journal* 14 (1984).

Kaufman, Irving R. "Keeping Politics Out of the Court." *New York Times Magazine,* Dec. 9, 1984, p. 72.

Markey, Howard T. "The Delicate Dichotomies of Judicial Ethics." 101 *Federal Rules Decisions* 373 (1984).

✔Torruella, Juan R. Remarks at induction into First Circuit judgeship, San Juan, P.R., Nov. 1, 1984.

ETHICS, from page 1

him—and the legislation authorizing it—violated the constitutional guarantee of an independent judiciary by placing disciplinary powers in the hands of a court rather than Congress and violated his due process rights. He further claimed that the legislation was impermissibly vague.

Judge Gerhard Gesell, rejecting that argument in *Hastings v. Judicial Conference,* No. 83–8850 (D.D.C. July 25, 1984), first noted that "Congress was acutely aware of the need both to preserve fundamental judicial independence and at the same time to enable the judiciary 'to put its own house in order' by providing tools to implement the judiciary's own disciplinary procedures where necessary to assure judicial accountability." He concluded that "the Act's disciplinary mechanism does nothing to encroach upon the essential independence of judges to decide cases."

Judge Gesell also ruled that the legislation authorizing the judicial council's investigation of Judge Hastings was not impermissibly vague and provided adequate due process rights for the subject of an investigation.

Moreover, the district court denied Judge Hastings's claim regarding the unconstitutionality of the Administrative Office's rejection of his demand that his legal fees in the disciplinary proceedings be paid for by the government. Judge Gesell noted, however, that Judge Hastings could pursue a nonconstitutional claim for compensation and suggested that the legislative history of the act seemed to favor such payment. ■

VIDEO, from page 2

and leases; labor contracts; avoiding powers; chapter 11 amendments and repurchaser agreements; and consumer amendments. (The catalog number for the video program is VB-021, for the audio, AB-0245.)

Either program can be borrowed in video or audio format from the Center's Media Services Unit, 1520 H St., N.W., Washington, DC 20005. Please include the appropriate catalog numbers in your request, and if you wish to borrow a video program, specify either ½-inch VHS format or ¾-inch U-matic format. ■

1984 Court Management Report Issued

The 1984 edition of *Federal Court Management Statistics* was published recently by the Administrative Office. It contains key data on the workload of federal trial and appellate courts during the years ending June 30, 1979, through June 30, 1984.

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

Vol. 17 No. 1 January 1985

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Chief Judge Aubrey E. Robinson, Jr.

D.C. District Court Has Unique Jurisdiction, Record of Speedy Case Disposition

Chief Judge Aubrey E. Robinson, r., has been a judge of the U.S. Dis-rict Court for the District of Columbia or more than 18 years, and has been hief judge of this court for more than years.

Judge Robinson, who was born and aised in New Jersey, graduated from ornell University and Cornell Law chool. He accepted his first legal job n Washington, D.C., after gradua-ion, and remained in private practice here until his appointment to the Dis-rict of Columbia Juvenile Court in 965. He was named to the district ourt bench in 1966.

Since taking office, Judge Robinson as served as a member of the Judicial onference's Ad Hoc Committee on Court Facilities and Design and Committee on the Administration of the Criminal Law. He has also served as a Board member of the Federal Judicial Center and was chairman of the American Bar Association's National Conference of Federal Trial Judges.

In a wide-ranging interview with The Third Branch, *Chief Judge Robinson comments on the atypical mix of cases in his district, warns that courts must not lose sight of their primary goal—dispensing justice—and urges periodic paid sabbaticals for federal judges.*

A 1982 Center study of the caseload of the U.S. Court of Appeals

See ROBINSON, page 4

William E. Foley

Wm. Foley Retires, Caps Distinguished Career At Administrative Office

William E. Foley has announced his retirement as director of the Administrative Office of the United States Courts, a position he has held since November 1977. Director Foley will remain in office until his successor is designated by the Supreme Court.

Mr. Foley has worked with the federal courts pursuing improved judicial administration for more than 20 years. He joined the Administrative Office as deputy director in 1964 and served in that capacity under the directorships of Warren Olney, Ernest Friesen, and Rowland Kirks. During Mr. Foley's tenure as director, the federal judiciary underwent unprecedented expansion: Since 1977 the two largest omnibus judgeship bills in the history of the nation created a

See FOLEY, page 7

Enrollment Opens for Judges' Summer Program

The Center will sponsor a pro-ram entitled "Statistics and Ex-ert Testimony in the Federal ourts" from June 9 to 14 at the niversity of Wisconsin Law chool in Madison. Because of the vorable reactions of the judges ho attended a similar Center-onsored seminar in Madison last ummer, the program is being re-eated this year.

The seminar will use a set of spe-ally fashioned cases in such areas employment discrimination, ntitrust, and securities regulation, mplemented by secondary read-gs and judicial opinions. In addi-on to plenary lecture sessions, ere will be small-group discus-ons between judges and faculty embers.

The seminar seeks to provide ractical assistance to judges in ealing with—

- Statistical and economic analyses offered to prove or disprove liability or damages.
- Problems in the presentation of expert testimony, including difficulties created when experts are inadequate to their task of explaining statistics, economic behavior, or other complex issues.
- Application of the Federal Rules of Evidence in such cases.
- The degree to which judges may step outside the adversary process to inform themselves of "legislative facts" underlying issues in a particular type of litigation.

Judges wishing to attend should write to Kenneth C. Crawford, Director of Continuing Education and Training, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. Letters should be received by Feb. 21.

This program is the only one for judges sponsored by the Center next summer. ■

Inside...

Chief Justice Renews Proposals to Reduce Court's Caseload ..... p. 3

Bankruptcy Act Held Constitutional ..... p. 3

Justices Rehnquist, Blackmun Highlight TV Special .... p. 7

New District Judges Gather at Seminar

Twenty-five recently appointed judges attended the FJC's week-long seminar for new district judges in Washington last month. The program featured lectures from judges and professors on key topics in federal law, remarks by the Chief Justice, and a dinner at the Supreme Court. Among those absorbed in one of the lectures were Judges Walter S. Smith (W.D. Tex.) and Ilana Diamond Rovner (N.D. Ill.), above left. Judges Peter K. Leisure (S.D. N.Y.) and Tom S. Lee (S.D. Miss.), above right, catch up on their seminar reading. At right, Professor Charles Abernathy of the Georgetown University School of Law illustrates a point during a lecture about employment discrimination law.

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.
Joseph F. Spaniol, Jr., Deputy Director, Administrative Office of the U.S. Courts.

Supreme Court Clerk Stevas Retiring at Term's End

The Chief Justice announced Jan. 11 that Alexander L. Stevas, Clerk of the U.S. Supreme Court for the past four years, will retire at the end of the Court's current term.

Mr. Stevas, a graduate of George Washington University Law School, was an assistant United States attorney in Washington, D.C., for 11 years, then clerk of court at the District of Columbia Court of Appeals and chief deputy clerk of the U.S. Court of Appeals for the District of Columbia Circuit. He has received numerous awards for outstanding service, including President Ford's Management Improvement Certificate and the American Judicature Society's Herbert Harley Award.

In making the announcement Chief Justice Burger said, "Mr. Stevas's retirement marks the end of a fine public career. We wish him well for the years ahead."

For vacancy notice, see p. 9.

Chief Justice, in Annual Report, Reviews Ways to Ease Court's Caseload

Chief Justice Burger, in his *1984 Year-End Report on the Judiciary*, called for renewed efforts to reduce the Supreme Court's caseload, and expanded on specific proposals to accomplish this.

Two major proposals—both of which have been suggested by the Chief Justice in the past—were to create a temporary panel of federal judges to handle intercircuit conflicts and to reduce the Court's docket by eliminating mandatory appellate jurisdiction.

The Chief Justice urged that the temporary intercircuit tribunal be created for a five-year experimental period, during which time Congress and the Court would evaluate this special court. Pointing to the fact that the Supreme Court reviews many cases merely because there is a conflict on a question of law among the circuits, the Chief Justice proposed that the Supreme Court be authorized to refer these cases to the temporary court. The special panel could provide a uniform federal resolution to issues when circuit conflicts arise. The Supreme Court could modify the panel's decisions, but otherwise its decisions would be binding on all federal courts.

Bills to create such a temporary tribunal were introduced in both the House and the Senate in the 98th Congress by Congressman Robert Kastenmeier and Senators Robert Dole, Strom Thurmond, and Howell Heflin, and were reported out of subcommittees in both houses.

Referring to the Court's mandatory appellate jurisdiction, the Chief Justice said that the elimination of this jurisdiction would not necessarily foreclose Supreme Court review, since cases with questions meriting review could still reach the Court by the discretionary writ of certiorari.

These two steps are needed, the Chief Justice said, because "Supreme Court Justices must now work beyond any sound maximum limits"—issuing more than twice as many full opinions as they did as recently as 1953. As a consequence, he said, "the precious time for reflection so necessary to a court that decides cases with far-reaching consequences has been reduced to, and possibly below, an absolute minimum."

In his year-end report, Chief Justice Burger also called for increased salaries for federal judges at all levels. He said it was "unseemly [and] unjust" that judicial salaries had not kept pace with inflation or with

See REPORT, page 8

THE SOURCE

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Chaset, Alan J. "Implementing Attorney Admission Rules in the Federal Trial Courts: A Status Report on King Committee Activities." 31 *Federal Bar News and Journal* 429 (1984).

Childress, Stephen Alan. "Standards of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis." 29 *Loyola Law Review* 851 (1983).

Hellman, Arthur D. "The Supreme Court's Second Thoughts:

See SOURCE, page 11

Judicial Appointments Under Bankruptcy Act Upheld

The constitutionality of the judicial appointment provisions of the 1984 bankruptcy reform act has been upheld by three district courts.

In one case, the subject of an involuntary bankruptcy petition challenged the constitutionality of the extension of the length of the terms of most bankruptcy judges. The Justice Department joined the suit on the plaintiff's side, questioning the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984, and the Senate and House joined the defense.

The extension was constitutionally permissible, Judge Robert H. Schnacke (N.D. Cal.) ruled, because Congress did not do the appointing, but merely changed "the scope and term of office," which it had the power to do.

The ruling, in *In Re Benny*, Misc. No. C–84–120 (N.D. Cal. Nov. 29, 1984), also held that the two weeks between the time Congress last extended the bankruptcy judges' tenure and the time the bill authorizing appointments was signed did not create a situation in which all bankruptcy judges had to be treated as new appointments. The government and plaintiff Alexandra Benny filed notices of appeal.

The same conclusion was reached in *In Re Wasatch Factoring, Inc.*, Misc. No. B–0015 (D. Utah, Nov. 26, 1984), an oral opinion by Judge David K. Winder.

In *In Re Tom Carter Enterprises, Inc.*, No. SA–84–0624–RP (C.D. Cal. Dec. 5, 1984), Judge Robert Takasugi found that the appointment of incumbent bankruptcy judges was retroactive and not provided for in the 1978 legislation. However, he ruled, Congress had as much power to make those retroactive appointments as it had to make the prospective ones. ■

ROBINSON, from page 1

for the District of Columbia Circuit described it as markedly different from the case mix in other circuits. Does the same hold true for the district court for the District of Columbia?

Yes. Because we are located in the nation's capital, the seat of the federal government, we get more than our proportionate share of civil cases that involve complex and significant legal, economic, and social issues, many of which have national impact. The AT&T case is one example. Our multidistrict cases involving swine flu, the Air Florida crash, the Korean Air Lines 007 case—all of these cases require a substantial exercise of judicial effort, more so than the ordinary civil jury case. The complexity in our caseload is documented by the statistics kept by the Administrative Office; we have the highest weighted caseload average of any district court in the nation, and it is not anticipated that this is going to change.

Do the kinds of cases that come up on your docket present any special problems because of the divided jurisdiction in the District of Columbia?

Not insofar as the civil cases are concerned. But they do present a difficult and special situation insofar as the criminal cases are concerned because under the existing statutory arrangement in the District of Columbia, federal crimes can be joined with local D.C. crimes in a single indictment. When that is done they are tried in our court. This gives rise to the problem of different evidentiary standards that frequently have to be applied. This also gives rise to procedural questions that require us to make a decision about what we will do and how we are going to do it. By and large, under the direction of our circuit court of appeals we have adapted the federal procedures, and, to the extent that we haven't been precluded from doing so by statute, those procedures are utilized in handling the local offenses that are joined.

Did the 1970 act transferring some jurisdiction from the U.S. district court to the District of Columbia Superior Court make quite a difference in your workload?

Washington Law Reporter photo

Chief Judge Aubrey E. Robinson, Jr.

Yes, it's made a difference in the workload of all the judges on the court. Prior to the court reorganization in 1970 our jurisdiction encompassed all of the felony criminal jurisdiction that existed in the District of Columbia, whether it arose out of a commission of local offenses or out of a commission of federal offenses. So we were basically, for all intents and purposes, a criminal trial court for a number of years, and most of our judges spent the vast majority of their time trying criminal cases.

Insofar as our civil jurisdiction is concerned, there was not a great impact because much of the civil jurisdiction that was separated out did not involve trials, but it certainly did involve additional work, since we had probate and conservatorship jurisdiction. Prior to 1970 we even had divorce jurisdiction in the District of Columbia.

Are District of Columbia lawyers going to file more cases in the U.S. district court if they think they will get to trial faster than they will in the District of Columbia Superior Court?

They will if they practice in both courts. There are many lawyers who limit their practices, not exclusively but almost, to one court or the other. I believe that there are a significant number of lawyers who do not feel comfortable practicing in the federal courts and they choose to practice in the local court. But if there are time constraints and if they are looking for verdicts that they think the lower court will not give them, they will file here. Incidentally, they can file a lawsuit here for $10 and it costs $60 to file a civil suit in the superior court. We have been trying for some time to get Congress to change the statute. Considering cheaper filing fees, a perception that they can get to trial more quickly, and the perception that because it is a federal court they may achieve a larger verdict if it is a jury case, lawyers who are comfortable with the federal system, and who have had some experience in practicing in this court, will file here.

Your current disposition time for civil cases is half as much as the national average for all district courts. How did your court achieve such a record of efficiency?

I think that the court is not solely responsible for that. If you look at other statistics you will see that our total average caseload per judge is significantly lower than a large number of other courts in the country. We do not carry a tremendous overall caseload, so our per-judge caseload enables our judges to spend more time with each of the cases for which they are responsible. To the extent that a judge can spend time with a case, he or she can control discovery, and by controlling discovery the judge has a much better idea of

See ROBINSON, page 5

ROBINSON, from page 4

what cases will in fact go to trial and what cases will be disposed of by settlement. The judge also has the opportunity to deal with a large number of cases that are disposed of by motion, particularly motions for summary judgment. So disposition time, in my judgment, is related basically to two major factors: the overall caseload responsibility of a judge and the ability of any particular judge to exercise strong control over his or her caseload even if that caseload is a large one.

Are your judges at peak efficiency right now?

Well, how do you measure the efficiency of a judge? Is it statistics reflecting the number of dispositions when dispositions can range all the way from the most minuscule kind of matter to one that may have involved as many as several months of trial? I don't know how you would measure efficiency. It cannot be done objectively except as you look at a total court structure. If, given our caseload, and given an incremental increase in that caseload every year, we were not reasonably keeping up with overall disposition, then you could say that as a unit, as a court, we were not operating efficiently. But even that would not mean that there might not be individual judges who were operating at peak efficiency. But if as you looked at the overall operation of the court you saw that in no area was it making any progress, then you could say that that court was operating inefficiently. Our judges are working conscientiously, some of them are overworking themselves. We have judges who are workaholics and they just get immersed in what they are doing and they just go and go and they drive everyone around them. But that doesn't make for efficiency necessarily.

Is there any way to get the disposition rate down?

It is necessary for many reasons to translate our work into statistics. But no court system worth having and maintaining can be operated on the basis of statistics no matter how they are refined. Our job is to see that people who are in difficulty with the criminal law, or who have problems inter se, can have their problems resolved so that the bottom line resembles justice as closely as we perceive it. If to achieve that it means that we have to spend eight months, and if in spending those eight months we have refined it so that the net result is justice, then we've done our job. This is not to say that there may not be a situation in which we can do it much more quickly. But the aim is not how quickly you can terminate cases, but how many you can run through the system, not how many you can take on. The aim is to see that the people we deal with feel that they have been fairly dealt with. Also, we have to remember that in doing this work we are not machines. There are peaks and valleys in our days and in our weeks and in our years. We cannot drive ourselves day in and day out for an extended period of time.

"Because we are located in the nation's capital . . . we get more than our proportionate share of civil cases . . . which have national impact."

"Our job is to see that people . . . can have their problems resolved so that the bottom line resembles justice as closely as we perceive it."

There are some judges that just naturally work faster or slower than others.

Yes, all of us have different work habits and work styles and what will work for me will not necessarily work for "X." Some judges like to write out all of their own drafts. Other judges are comfortable with dictating, other judges are comfortable with doing very little writing, spending more time in discussions with their law clerks, or more time in the trial of cases; what works for some does not necessarily work for others. There is no single pattern.

There are 15 authorized judgeships and there are five senior judges serving the U.S. District Court for the District of the District of Columbia. Do you feel you have enough judge power?

We do at our present rate of filings, both civil and criminal, and that's primarily because all of our judges work and they work diligently. With the support that we get from our senior judges we are able to control our caseload. It's a good situation and we see no present necessity for additional judgeships. In addition to our active and senior judges, one other factor that is of considerable help is the support of our three magistrates. Those magistrates, especially in the criminal area, are very helpful in keeping the caseload current. As for the preliminary matters that are involved in criminal and civil caseloads, magistrates are being utilized by most of our judges. They do most things to assist us in the discovery process and by acting as special masters when we find that we need them. They hold trials of cases where the parties consent to trial before a magistrate. We are not under any great pressure in terms of our overall workload.

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Your court is unique in that all of your jurisdiction is in one geographical area—one city. All your judges are in one courthouse. Does that make your work as a chief judge easier?

Yes, I think it makes it easier. Because we are all physically located in one building it gives rise to the opportunity for much more personal communication and contact, which helps in administering a court. There is also a greater sense of collegiality, which one needs in order to have new ideas presented and discussed rationally to improve the functioning of the court. There is never a problem involved in travel.

Judge Robinson

We have a lot of informal contact, and one tremendous advantage we have being located in one building is that we have an opportunity to frequently have lunch together, where we can discuss a variety of things. It's much easier to have regular meetings in the courthouse, much easier to have committee meetings, and much easier to involve the active litigating lawyers in the community. One of the things we are constantly concerned about is having bar reactions to some of the things we are doing, getting input from the practicing lawyers on ways we can improve. Having them in this relatively small geographical area is very helpful.

The recently enacted Comprehensive Crime Control Act of 1984 makes sweeping changes in the criminal law area. What are your reactions to these changes?

Well, Congress has spoken, and with the furor that has gone on for a number of years about sentencing disparity, it was an expectation that Congress would codify a mandatory sentencing commission, despite efforts that many district courts had made toward sentencing conferences—despite the efforts of the Federal Judicial Center through its educational programs, despite judicial conferences and circuit conferences around the country, and sentencing institutes. It was an idea whose time had arrived.

I believe that when Congress makes the law it ill-behooves me to waste my time and energy arguing about legislation Congress has passed. I believe that we serve best when we try to understand the legislation and the background of the legislation, and attempt to make it as effective as possible. Congress has spoken: Sentencing guidelines will be established; they will be mandated. We have the same obligation as any other citizen affected by legislation, and that is to operate within the bounds of that legislation until it is either appealed or declared to be unconstitutional, neither of which I expect to happen vis-à-vis the new Comprehensive Crime Control Act, at least insofar as the Sentencing Commission is concerned. As for the Sentencing Commission, it has a very difficult job to perform, but there will be the opportunity for input from a large number of people on what should and should not be included in the guidelines.

Just as we made adjustments when the Bail Reform Act of 1966 was enacted, we shall adjust to the requirements of the new bail reform statute. The procedural, practical, and constitutional problem of preventive detention will be tackled in a deliberate and orderly fashion with the requirement of a complete record of our actions. We can anticipate exacting appellate scrutiny.

As far as the Parole Commission is concerned, there again a policy decision has been made. The Parole Commission will have to operate, as I understand it, for a while because there are many people who are still incarcerated who will be subject to the statutes as they existed prior to the abolition. It will be phased out.

It will have to function, obviously, in the context of an entirely new arrangement. Its judgment may be affected by what it sees is on the books with respect to defendants over whom it will have no responsibility. Congress has spoken in no uncertain terms about the desirability of considering punishment, and the desirability of reducing sentencing disparities, and about the desirability of removing from the community people who are dangerous to themselves or others.

"One of the things we are constantly concerned about is . . . getting input from the practicing lawyers on ways we can improve."

Much has been said recently about the federal courts getting into too many social issues—abortion, religion, and so forth—issues some say shouldn't even be in the courts. Do you think some of these or other issues should not be resolved in the federal court system?

Absolutely not. It is quite true that there are and have been outstanding state systems. There are

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Justices Blackmun, Rehnquist, in TV Interview, Discuss Court's Ideology

The Supreme Court is not "chipping away" at civil liberties as some critics claim, Justice William H. Rehnquist said recently in his first-ever television interview.

Civil liberties claims are "essentially antimajoritarian" and should be "sustained when the Constitution requires that they are sustained," Justice Rehnquist said. "But that certainly doesn't mean that every time a case comes to this court where the term 'civil liberties' is invoked, the court ought to unthinkingly decide" in the claimant's favor.

Justice Rehnquist's remarks, as well as an interview with Justice Harry A. Blackmun, were taped in September and broadcast in late December as part of an hour-long program about the Court produced by ABC News. ABC said all the justices were invited to appear.

Justices Blackmun and Rehnquist agreed that the Supreme Court moves in cycles. Justice Blackmun predicted some "pendulum swing" as the Court's justices are replaced over the next several years and voiced hope that the shift will be gradual because "abrupt changes in legal philosophy would be hard on the nation."

Justice Rehnquist called change on the Court "a cyclical thing." ■

FOLEY, from page 1

total of 237 additional judgeships. Mr. Foley oversaw a number of key improvements, including the establishment of pretrial services agencies and the creation of a new unit within the AO to increase and enhance the level of courthouse security.

His term also included the introduction and eventual widespread use of computer and word-processing equipment in court offices, the creation of a federal court library system with a special library unit in the AO, the development of a design guide for the construction of court facilities, and the creation of the first comprehensive schedule for the disposition of court records.

A native of Danbury, Conn., Mr. Foley holds four degrees (A.B., LL.B., A.M., and Ph.D.), all from Harvard University. In 1940, he joined the Department of Justice, leaving two years later for service during World War II as a lieutenant commander in the Navy. He had four years of active duty, eventually retiring from the Naval Reserve in 1968 with the rank of captain.

Mr. Foley returned to Justice in 1946 as part of the War Frauds Unit, trying cases in the Southern District of New York, and was designated chief of the Internal Security and Foreign Agents Registration Section, Criminal Division, in 1948. His 20-year career at Justice included appointments as executive assistant to the assistant attorney general, Internal Security Division (1954–1958), and deputy assistant attorney general, Criminal Division (1958–1964).

Director Foley served as secretary to the Committee on Rules of Practice and Procedure of the Judicial Conference from 1965 to 1977, and has been a member of the Board of the Federal Judicial Center and the Board of Certification.

Chief Justice Warren E. Burger noted "the many contributions [Bill Foley] has made to the federal courts," and added: "His strong leadership will be missed." (See *The Third Branch*, January 1985.)

Calling him "an extraordinarily accomplished public servant, as well as a friend," Senior Judge Elmo Hunter, chairman of the Judicial Conference's Committee on Court Administration, stated that "Bill Foley's finest traits are his dedication to his job and his total fairness. He is not only highly educated, but extremely bright."

Chief Judge Charles Clark, chairman of the Judicial Conference Committee on the Budget, noted that "being the director of the Administrative Office of the United States Courts is a most difficult job. He is always between the rigid strictures of congressional enactments and judicial conference directives on the one side and the insistent demands of over 920 independent, life-tenured federal judges on the other.

"During more than 20 years of service as deputy director and director, Bill Foley has done this grinding job with uncommon dedication, equanimity, and common sense," Chief Judge Clark said. "His retirement marks a time when everyone in the judiciary should recognize our good fortune in having had his steady hand at the tiller. I wish him Godspeed."

A. Leo Levin, director of the Federal Judicial Center, praised Mr. Foley's "rare combination of wisdom, common sense and unstinting devotion to the federal judicial system. Under his leadership our two organizations worked more closely together than ever before in the effort to serve the courts more effectively." ■

CALENDAR

Feb. 1–2 Judicial Conference Committee on the Budget

Feb. 3–6 Sentencing Institute for the Eighth and Tenth Circuits

Feb. 4–6 Civil Case Management Workshop

Feb. 20–22 Seminar for Bankruptcy Judges

Feb. 27–Mar. 1 Seminar for Magistrates of the Ninth and Tenth Circuits

REPORT, from page 3

increases for federal employees generally; and the report footnoted a reference to Article III of the Constitution, which guarantees that salaries of federal judges "shall not be diminished during their Continuance in Office."

To bolster his argument for increased judicial pay, Chief Justice Burger noted that most law clerks to the justices earn more after 10 years' practice than the $100,600 the justices receive. He said that more than 40 federal judges have resigned in the last 15 years, "most of them because of inadequate compensation."

Also in the year-end report, the Chief Justice—

- Urged elimination of diversity jurisdiction.
- Strongly urged Congress not to create a statutory scheme of jury selection by attorneys in the federal trial courts, and thus repeat the "disastrous experience" of some state courts.
- Voiced renewed support for the concept of "factories with fences," which would afford prison inmates meaningful work while in state and federal prisons. The program would keep the inmates occupied, provide them with marketable skills upon release, and help pay part of the high costs of prisons.
- Encouraged the press to take note of instances in which attorneys or litigants are sanctioned for filing frivolous suits or for abuse of pretrial discovery.
- Called for modification of the congressional guidelines for judicial appointments to the new Sentencing Commission, to allow appointment of senior judges and to provide for temporary replacements for active judges who are appointed.
- Asked for the creation of a three-branch federal courts study commission to inquire about and report on the future needs of the federal court system.
- Called upon the federal judiciary to continue efforts to save money through, among other things, efficient jury-management procedures. He urged Congress to authorize the consolidation of the headquarters of the Administrative Office of the U.S. Courts and the Federal Judicial Center into one building. Presently the AO and the FJC are housed in seven different sites in the District of Columbia and Maryland, the rental expense of which would amortize the cost of a new building.

The Chief Justice also proposed the appointment of a tenth justice who, as "Associate Justice for Administration," would assist with administrative matters but have no judicial duties. He explained this proposal in an interview published in the January 1985 issue of the *American Bar Association Journal*. In that interview, the Chief Justice noted that, because of the growing number of judicial and administrative duties, he is compelled to work an average of 80 hours per week. He envisions the tenth associate justice as strictly a non-judicial officer who would coordinate all the functions of the Chief Justice with the Administrative Office, the Center, and the Judicial Conference of the United States.

The "administrative justice" would be appointed by the Chief Justice for a five-year term and would be a district or circuit judge "with some talent and liking for administrative matters." ■

Use of Jurors Praised

Following Judicial Conference praise for district judges' improvements in juror utilization, the Chief Justice lauded those steps in his year-end report. His assessment of the increase in juror-use efficiency followed comments from the Conference last year hailing efforts to reduce the number of jurors needed and the time jurors await assignments. Efficient use of jurors was also praised by legislators at budget hearings at which Chief Judge Charles C. Clark, who heads the Conference's Committee on the Budget, testified.

FJC Report Examines Efforts to Set Guidelines For Court-Awarded Attorney Fees Before Trial

The Center recently published *Judicial Regulation of Attorneys' Fees: Beginning the Process at Pretrial*, by Thomas E. Willging of the Center's Research Division. The report deals with an effort to control the cost of litigation by defining the court's attorney-fee-award standards at the commencement of the litigation. It features the results of a survey of lawyers' reactions to Judge John F. Grady's innovative pretrial order in the 1983 *Continental Illinois Securities Litigation*.

This order, designed to prevent fee abuses by plaintiffs' attorneys in class actions, sets forth specific guidelines for reviewing fee petitions. Issues covered in the order include compensation for conferring, duplication of effort, rates of compensation, limits on services, and forms of time records.

The 39 lawyers surveyed, representing six categories of practice, identified several innovative features of the order and applauded its concept, but suggested certain improvements. They also called for a more flexible approach to reducing attorneys' fees without sacrificing the quality of or access to counsel.

Copies of this report can be obtained by writing to the Center's Information Services Office, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope). ■

Parties Hundreds of Miles Apart Linked Electronically in Courtroom

An innovative procedure brought a bankruptcy petitioner into a Virginia courtroom electronically last month, even though he was actually hundreds of miles away.

The unusual hearing involved Edwin P. Wilson, the former CIA agent jailed for gunrunning and attempted murder. Wilson is in a maximum-security prison in Marion, Ill., and transporting him to the hearing at the bankruptcy court in Alexandria, Va., would have been expensive and posed security problems. Bankruptcy petitioner Wilson appeared via satellite on two wide-screen video monitors.

Wilson's presence was required at a preliminary hearing, during which creditors sought information about his assets. Wilson had filed for bankruptcy protection to keep creditors from seizing, among other things, land he owns in Virginia.

The problems his movement and presence would have posed prompted U.S. Trustee William White to suggest the teleconference. Mr. White said he had kept use of such a procedure "in the back of my mind" since Chief Justice Burger proposed wider use of teleconferences to save time and money.

Mr. White is trustee in the jurisdiction encompassing the District of Columbia and the Eastern District of Virginia—one of 10 pilot programs in 18 district courts.

He had discussed the concept with the four bankruptcy judges in his jurisdiction—Judges Martin V.B. Bostetter, Jr., Blackwell N. Shelley, and Hal J. Bonney, Jr. (all E.D. Va.) and George F. Bason, Jr. (D.D.C.)—and all of them approved. Bankruptcy Judge Bostetter approved the specifics of Wilson's appearance.

More than 50 attorneys and spectators attended the hearing, Mr. White said, and none of them voiced any opposition to the unusual arrangement.

Mr. White, declaring that "the electronic age is here," said, "We're going to do this more often. You can save a great deal of money, [because] your real expense is all the running around." His sentiments were echoed by Michael M. Sheppard, clerk of the Eastern District of Virginia Bankruptcy Court. Two more cases utilizing electronic conferences with hospitalized participants are planned for the near future.

One addition that may be made in the future is to put document-transmitting machines at both ends of the electronic hookup.

The video hookup for the Wilson hearing was arranged by the Justice Department, which is charged with protecting him.

Positions Available

Clerk of Court, Supreme Court of the United States. Salary from $61,296. Responsible for the management of the clerk's office, including interpreting Rules of Court, advising counsel on procedural matters, supervising office personnel, preparing calendars, and managing automated docketing systems. Requires law degree and a minimum of 10 years' experience in a legal environment, at least 5 years of which included substantial managerial experience in a court system. General knowledge of appellate courts and computer technology desirable. To apply, send standard form 171 by Mar. 8 to Betsy Saxon, Assistant Personnel Officer, Supreme Court of the United States, Room 3, Washington, DC 20543.

* * *

Senior Staff Attorney, Fourth Circuit. Responsible for 10 attorneys and 4 other employees who review substantive motions and pro se cases and who review cases for suitability for disposition without oral argument. Applicant must have a law degree, be admitted to the bar, and have 5 years' experience in law practice, legal research, legal administration, or legal education. Salary from $44,430 to $67,940. To apply, send resume and writing sample by Mar. 1 to John M. Greacen, Clerk, U.S. Court of Appeals, Tenth and Main Streets, Richmond, VA 23219.

Clerk of Court, U.S. District Court for the District of Arizona (Tucson). Responsible for managing the administrative duties of the clerk's office. Applicant must have 10 years of administrative experience, at least 3 of them in a position of substantial management responsibility. An undergraduate degree may be substituted for 3 years' experience, a law degree for another 3 years' experience, and any post-graduate work in public, business, or judicial administration for one year's experience. To apply, send resume by Feb. 28 to Chief Judge Richard M. Bilby, U.S. District Court, Room 415, 44 East Broadway, Tucson, AZ 85701.

* * *

Magistrate, U.S. District Court for the Southern District of New York (New York City). Salary $68,400. For a term of eight years, subject to renewal. Applicants must have practiced law for a period of at least 5 years (with some substitutes authorized), be less than 70 years old, and not be related to a judge of this district court. A merit selection panel will review all applicants and recommend to the judges of the court in confidence the five persons whom it considers best qualified. Candidates should submit a letter and detailed resume by Feb. 15 to: Judge Robert L. Carter, U.S. Courthouse, Room 1901, 40 Centre St., New York, NY 10007.

ROBINSON, from page 6

state judicial systems that can deal very effectively with these issues. The issues you posed obviously are the ones that concern the whole country. They are not local in any territorial sense. I don't know where else they would be resolved if they are to be resolved at all in the context of the court system. Now obviously they can't be dealt with exclusively in the executive branch because of the limitations of the executive's authority, even working through established agencies. Legislating does not obviate the necessity to resolve matters in the court system because there is no legislation ever passed by Congress that is not challenged in some place in a court system. So, in that sense I don't know where else any of these issues could arise. But, more fundamentally, these issues don't arise in the abstract; they all arise in the context of individual, statutory, constitutional rights, and it is the responsibility of the federal court to be the basic protector of the individual constitutional rights of the citizens of this country. There is no question in my mind that this litigation is where it belongs, and that's in the federal system.

"No court system worth having and maintaining can be operated on the basis of statistics. . . ."

Sometimes friction develops between trial and appellate court judges; I'm thinking of state as well as federal judges. It is based on reversals, intellectual and philosophical disagreements, disparities in salaries, on the fact that some don't have a voice in matters on council levels. Do you have any suggestions for ameliorating some of these situations?

Circuit judicial conferences and circuit judicial councils should continue efforts to provide reasoned discourse between district and appellate judges. Increased opportunities for informed personal contacts will ameliorate many of the tensions between judges in the federal system and between federal and state judges. Artificial barriers must be eliminated. The respect that the average citizen in this country has for the law and for judicial office should not be denigrated by the inability of judges to work with each other, no matter on which court they sit.

"To the extent that a judge can spend time with a case, he can control discovery."

If you could make one change in the way the federal judiciary operates today, procedural or statutory, what would it be?

If I had one opportunity, high on my list would be the establishment of sabbatical leave for every federal judge.

What time limit would you set?

One should be eligible for a sabbatical after 10 years on the bench. As for the length of the sabbatical, I would think no less than 6 months, ideally 12 months.

After being immersed in the business of judging, year in and year out, I believe one needs to have an opportunity to step back and think—to get some perspective. A judge should have the opportunity to explore some areas of the law in depth—those areas that he or she may not previously have had the opportunity to explore. We need to think about what's coming down the line, to determine whether we want to spend the rest of our life on the bench.

Do you believe that opportunities to travel and meet other judges in other countries would help?

I would put no restrictions on the sabbatical at all. I don't think there should be any requirement that you do anything. I have enough confidence in the integrity of the people to be sure they would avail themselves of the opportunity to do the kinds of things they feel they should do. If it be travel they felt they needed, they would travel; or if it be to study, write, or teach, they would do that. These are the kinds of people, by and large, who have been appointed to the bench. There's a sense of dedication that one has, and it stays; there's a sense of purpose. There need be no restrictions placed at all, just the opportunity.

At least one state, Oregon, does that. The drawback is that their pay stops. They can go off the bench for a year, they can go seek other endeavors, or they can just rest.

They can't rest very well if they don't have any money to rest upon.

That's exactly it. So they teach, most of them.

I think that that is an undesirable situation. What I'm talking about, of course, is the epitome; there is little possibility of the acceptance of the suggestion that a judge be paid for doing what he or she wants to do for a year. There may be some who can afford the Oregon plan; there may be some wealthy enough before they came on the bench who can afford to do what they want to do and not even have to teach. But we are in a position where, even if we can afford to do it, we can't. I would like judges to have the opportunity, and that would be a choice that each judge would have to make.

Do you find that your administrative work as chief judge of a big

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ROBINSON, from page 10

metropolitan area court is very demanding—almost too demanding?

No, I don't find it's too demanding. It is demanding, but I happen to enjoy it. I enjoy it because there are things that I have gotten interested in through my experience at the Federal Judicial Center, my contact with other Judicial Conference judges, service on the Judicial Conference committees, and working in the Judicial Administration Division of the American Bar Association. They are areas of concern that I have developed. I'd like to see what I can do about improving the way our court operates. The other reason that I say it is not overburdening is that I have excellent cooperation from the judges on our court. I do not have to participate actively in the draw of new cases. I can limit myself. I have charge of the grand jury, for example. I have been the backstop for the bankruptcy judge because we only have one bankruptcy judge in this jurisdiction. I've taken special cases that I thought would relieve other judges in the court, and I have picked up miscellaneous things to complement the time I spend doing administration.

Do you delegate some tasks?

Oh, yes, I am supported by excellent staff. But if I begin to delegate to other judges, then I've just drawn other judges away from their responsibilities to their casework. The fact of the matter is there are many of us who are not interested in administration and aren't worth a nickel when it comes to administering anything. There are others who administer extremely well. This court was at one time administered by Chief Judge George Hart. He loved it and he was an excellent administrator. Courts need good administrators, but under the system they may have one and they may not, since one gets to be chief judge by seniority.

Have you made changes here that you are very pleased with?

Yes. Well, some of the things we are still in the process of changing.

"One should be eligible for a sabbatical after 10 years on the bench."

But one has to do with the grand juries. We have reduced the number of our grand juries from 14 to 6. We have greatly improved the utilization of the grand jurors' time. We have a much better relationship with the prosecutors in the utilization of grand juries. We have been able to involve staff in the whole court process and develop good rapport with court personnel. We are very fortunate that the clerk of our court, James Davey, is very well trained, very experienced, works well with us, and is considered one of the best clerks in this country. And when you can rely on that kind of person, who himself has developed a staff upon which he can rely, it is extremely helpful. The same is true for our probation office. We have a very fine probation office, supervised by Chief Probation Officer William H. Webb, and we are proud of it.

Do you have two law clerks, Judge?

Yes, I do.

Could you use three?

I think not. I couldn't use three, and two is presenting problems for many judges because of space limitation in the building.

One of the greatest criticisms of federal judges, especially by judges from abroad, is plea bargaining. What's your answer to this criticism?

Plea bargaining is necessary. Plea bargaining is just not understood.

Judges don't have anything to do with plea bargaining, except in one instance, and that is if they get involved actively under rule 11 in approving not only the plea but the sentence. Judges have nothing to do with, nor control over, what goes on between the prosecutor and the defense lawyer. So it's not a judicial problem. Plea bargaining is the problem of the executive branch of government. It arises because prosecutors overcharge and overindict. If they run the grand juries and grind out indictment after indictment, somebody has to try them. Until the public is willing to significantly increase court facilities and judicial personnel, there have to be other solutions, and plea bargaining is one of them. Any lawyer worth his salt as a criminal defender knows that all he has to do is ask for a jury trial and it will be granted. It is presently impossible in many courts to have all of the defendants tried who are entitled constitutionally to a jury trial. The average plea bargain is arrived at when the defendant has been overcharged and the lawyer knows that the case will never get to trial. ■

SOURCE, from page 3

Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions." 11 *Hastings Constitutional Law Quarterly* 5 (1983).

Levin, A. Leo and Susan Leeson, "Issue Preclusion Against the United States Government." 70 *Iowa Law Review* 113 (1984).

Miller, Arthur R. "The Adversary System: Dinosaur or Phoenix." 69 *Minnesota Law Review* 1 (1984).

Rodino, Peter W. "The Proposed Balanced Budget/Tax Limitation Constitutional Amendment: No Balance, No Limits." 10 *Hastings Constitutional Law Quarterly* 785 (1983).

FJC Publishes Annotated Synopsis of 1984 Crime Control Legislation

The Center recently published *The Crime Control and Fine Enforcement Acts of 1984: A Synopsis,* by Anthony Partridge of the Center's Research Division. The report was distributed within the federal judiciary as part of the Jan. 17 video seminar on the Comprehensive Crime Control Act of 1984.

The report, a 63-page summary in outline form, details the statutes' various provisions, with annotated citations and page-by-page specifications of the effective dates of the provisions under analysis. It reviews prospective changes in federal sentencing procedures and catalogs the numerous changes to the substantive criminal law. Special emphasis is placed on provisions dealing with bail and youthful offenders, on changes affecting fines, forfeitures, and special assessments, and on changes regarding offenders with a mental disease or defect. A subject matter index to the statutes is included.

The report has been sent to judges, magistrates, probation and pretrial services officers, federal and community defenders, and clerks of court. Additional copies are available by sending a self-addressed mailing label, preferably franked (but not an envelope), to the Center's Information Services Office, 1520 H St., N.W., Washington, DC 20005. ■

Judge Mansfield Named To Special Division

Senior Judge Walter Mansfield (2nd Cir.) has been named to a vacancy on the special division of the Court of Appeals for the District of Columbia Circuit, which appoints independent counsel—formerly known as special prosecutors—pursuant to 28 U.S.C. § 49.

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udge Burnita Shelton Matthews

Leader of Women's Rights Movement Recalls Suffrage Fight and Appointment to Bench

Judge Burnita Shelton Matthews, an ppointee of President Harry S Truman 1949, was the first woman district urt judge in the federal court system. After serving on the trial court for 19 ars, she took senior status in 1968 and t by designation on the Court of Apals for the District of Columbia Circuit, as well as on the Court of Customs d Patent Appeals.

In the following interview, in her ambers at the U.S. courthouse, Judge atthews recounts many efforts by herlf and others to bring about women's ghts in this country, including the ght to vote. When Judge Matthews was private practice, no opponent was too rmidable, including Chief Justice illiam Howard Taft, who wanted propty owned by the National Woman's rty so that the Supreme Court buildg could be erected there. Although she st the battle to prevent the property's ndemnation, she received the largest ard in that condemnation proceeding. Currently, the Judge is working on e distribution of her papers, most of which will go to the Arthur and Elizabeth Schlesinger Library on the History of Women in America at Radcliffe College in Cambridge, Mass.

Judge Burnita S. Matthews
1973 photograph

When did you first come to Washington, Judge?

I came to Washington when World War I started and when Woodrow Wilson was president. I wanted to study law and there just

See MATTHEWS, page 6

Prison Factories May Turn Ideas Into Products

Inmates may get high-tech manufacturing jobs under a program designed to encourage inventors and have prison factories make their products.

Unicor, the trade name of Federal Prison Industries, operates 75 manufacturing plants at 47 federal facilities. The factories' output ranges from furniture to circuit boards for various government agencies.

Unicor executives are seeking new products whose manufacture is labor intensive. The prime designers of such products are inventors seeking government assistance to finance production.

The Energy Department's Energy-Related Invention Program and the Commerce Department's Office of Small Business Technology both assist such inventors, and both refer to the prison agency those inventors with products that seem to meet Unicor's standards.

The advantage to inventors who arrange for production by Unicor is that they do not need to acquire or invest capital in production facilities. Also, because a market among federal agencies is assured, there is not a long wait for royalties.

Chief Justice Renews Proposal for National Intercircuit Panel

Declaring that "we passed any sensible limit on what the Supreme Court should be asked to do . . . years ago," Chief Justice Warren E. Burger has renewed his call for a national appellate panel of circuit court judges, chiefly to resolve circuit conflicts.

The new panel the Chief Justice envisions to cut the Supreme Court's workload would be temporary and experimental, functioning as an auxiliary to the Supreme Court and as a composite *en banc* panel of all the circuits, designed to resolve intercircuit conflicts, chiefly on statutory interpretation.

It would be composed of judges drawn from Courts of Appeals, both active and senior, and would have a five-year life.

The Chief Justice spelled out the need for such a tribunal at a speech at the American Bar Association's midyear meeting in Detroit last month and urged his audience to let their views be known to members of Congress.

The Chief Justice's most telling point was that by Dec. 15, 1984, the justices had been assigned as many cases as were decided by full opinions in the entire 1953–54 term of the Court. By coincidence, in the first 10 weeks following Oct. 1, 1984, there were 65 cases calling for full signed opinions.

"Why is it so difficult," he asked, "to grasp the reality that just as we need more police and more courts to deal with automobile traffic than we did 75 years ago, when there were very few automobiles, we need something more to deal with the avalanche of cases coming to the Supreme Court?"

What he is urging, the Chief Jus-

See CHIEF JUSTICE, page 9

Courts Using Jurors More Efficiently

The number of trial jurors called for service in the federal courts rose 3.7 percent in the last statistical year, the Administrative Office reported.

The percentage of jurors not selected, seated, or challenged in a given day dropped from 19.4 percent to 18.9 percent, according to a report prepared by the AO's Statistical Analysis and Reports Division. It covers the period from July 1983 to June 1984.

The number of jurors who are not seated or at least examined for service on a panel in a given day is considered a benchmark of how efficiently jurors are utilized. The report singled out the districts of Puerto Rico and Minnesota as those where the largest percentages of jurors called—more than half—are not selected or challenged on a given day. The Eastern District of Oklahoma utilized 99 percent of the jurors it summoned for service on a given day. The study placed the cost of the unutilized jurors at $143,833 in Puerto Rico and $283 in the Eastern District of Oklahoma.

The national average for unutilized jurors was 36.4 percent, and their cost was estimated at more than $31 million.

The report also noted that there were 232,844 grand jurors used in

See JURORS, page 5

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

Published monthly by the Administrative Office of the U.S. Courts and the Federal Judicial Center. Inquiries or changes of address should be directed to 1520 H Street, N.W., Washington, DC 20005.

Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Joseph F. Spaniol, Jr., Deputy Director, Administrative Office of the U.S. Courts.

Two New Center Publications Available

E.D. Michigan Mediation Program Evaluated

The Center recently published *The Wayne County Mediation Program in the Eastern District of Michigan*, by Kathy L. Shuart. The report, part of *Innovations in the Courts: A Series on Court Administration*, describes a procedure used by the United States District Court for the Eastern District of Michigan. That procedure, adopted in 1981 in response to an increase in diversity case filings, utilizes an existing program developed by the state trial court in Wayne County (Detroit), Michigan.

In addition to outlining the operation of the mediation program in the two courts, the report reviews three prior studies of the procedure's performance, which were based on court records and interviews with judges and lawyers. Copies of the court's rules and selected forms are included for the information of courts considering adoption of such a procedure.

Copies of the report can be obtained by writing to the Center's Information Services Office, 1520 H St., N.W., Washington, D.C. 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope). ■

Asbestos Litigation Management Reviewed

The Center recently published *Asbestos Case Management: Pretrial and Trial Procedures*, by Thomas E. Willging, a report based in part on a conference of federal judges, magistrates, clerks, and other court personnel sponsored by the Center in June 1984.

The report focuses on case-management procedures various courts have adopted to alleviate the pressures of asbestos litigation and facilitate prompt resolution. Among the methods described are use of standardized pretrial procedures to avoid unnecessary duplication of effort, use of calendaring systems to establish firm and credible trial dates, and consolidation of cases for trial to conserve judicial trial time.

While recognizing that asbestos cases have imposed a substantial burden on the resources of a few district courts, the report concludes that asbestos cases have become relatively routine products-liability cases, susceptible to traditional as well as innovative case-mangement techniques. Specific procedures such as the use of standardized pleadings and a novel use of standardized sanctions, are documented.

Copies of the report can be obtained by writing to the Center's Information Services Office, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope).

May 1, 1985
LAW DAY-U.S.A.

The American Bar Association's theme for this year's Law Day is "Liberty and Justice for All."

Multidistrict Panel Refers Bhopal Cases to S.D.N.Y.

The Judicial Panel on Multidistrict Litigation ruled last month that 18 actions against the Union Carbide Corporation, stemming from a gas leak at a plant in Bhopal, India, that killed an estimated 2,000 people last December, would be consolidated in the Southern District of New York for pretrial proceedings.

The cases were assigned to District Judge John F. Keenan. ■

ircuit and District Historical Societies Trace Courts' Roots

Two circuits and four districts now ve historical societies, according to Third Branch survey. More such ganizations will probably be cre- d following the suggestion made the last Judicial Conference meet- ; that the chief judge of each cir- t appoint a circuit historian.

The circuits with existing historical cieties are the Second and the venth. Such groups can also be ınd in the Southern District of w York, the Eastern District of nnsylvania, the Northern District California, and the District of egon.

The Second Circuit Historical Soci- is composed of two parallel nmittees—one representing the ırt and one representing the Fed- l Bar Council, a private group. e society's most active unit is the Exhibits Subcommittee, which arranges historical exhibits that appear in the library of the courthouse in lower Manhattan.

The Eleventh Circuit's two-year-old society is a private nonprofit organization whose membership is open to anyone. The society has the advantage of chronicling an appeals court that has been in existence only one year more than the society. However, the group plans to record the history of all the district courts in the circuit, and of judges who have served in those courts. It plans to assemble portraits, oral histories, and printed materials showing the courts' histories. It hopes to publish a written history within the next few years.

The Federal Circuit, which does not have a formal historical society, maintains a collection of articles about the court. There are also documents about the Court of Claims and the Court of Customs and Patent Appeals, the Federal Circuit's predecessor courts.

The Northern District of California Historical Society is not formally connected to the court it chronicles. It is a private, nonprofit organization composed of judges, attorneys, and scholars.

The Oregon district's society is an adjunct of the court, but membership in the group, formed in 1983, is open to anyone. The society has begun an oral-history project and has acquired equipment for videotaping the court's ceremonial occasions.

The District Court for the District of Columbia is weighing the formation of a historical society. ■

illiam R. Burchill Named General Counsel f AO to Replace Retiring William M. Nichols

The director of the Administrative fice has announced the appointnt of William R. Burchill, Jr., as ıeral counsel of the AO, succeed- William M. Nichols, who retired month.

Mr. Burchill, a graduate of the iversity of Pennsylvania and orge Washington University Naıal Law Center, has served in the ministrative Office since 1973. He s employed as an attorney in the gistrates Division before nsferring to the Office of the Gen- l Counsel in late 1974. He was ned associate general counsel in 6, then deputy general counsel in e 1982. Between 1975 and 1982 served as staff assistant to the Juial Conference Committee on the eration of the Jury System.

The general counsel oversees a ff of 12, including six attorneys. head of this office, the general nsel serves as legal advisor to the director of the Administrative Office, provides staff assistance of a legal nature to the Judicial Conference and its committees, and arranges representation for court officers sued in their official capacity. ■

William R. Burchill

Sentencing Institute Examines New Laws

The future of sentencing under the Sentencing Reform Act of 1984 was discussed at a sentencing institute for circuit and district judges and chief probation officers of the Eighth and Tenth Circuits in Long Beach, Cal., last month. Recent decisions affecting community service and victim restitution, and the impact of the Bail Reform Act of 1984 on pretrial and posttrial defendants, were also explored.

In addition to a tour of the Federal Correctional Institution at Terminal Island, Cal., there were workshops focusing on sentencing in hypothetical cases during the institute, which was held from Feb. 3 to 6.

Two more sentencing institutes are being planned: one for the Fifth and Seventh Circuits to be held Mar. 31–Apr. 3 in Durham, N.C., and one for the Second and Sixth Circuits to be held Mar. 16–19, 1986, also in Durham. ■

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Service, 1520 H Street, N.W., Washington, DC 20005.*

Coffin, Frank M. *A Lexicon of Oral Advocacy*. National Institute for Trial Advocacy (1985).

Combs, Michael W. "The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective." 13 *Journal of Law and Education* 345 (1984).

Committee on Criminal Advocacy and Criminal Courts. "Building a Consensus on Attorney-Conducted Voir Dire: The Proper Roles of Court and Counsel." 39 *Record of the Association of the Bar of the City of New York* 460 (1984).

Cooley, John W. "Could Settlement Masters Help Reduce the Cost of Litigation and the Workload of Federal Courts?" 68 *Judicature* 61 (August 1984).

Coolley, Ronald B. "Magistrates and Masters in Patent Cases." 66 *Journal of the Patent Office Society* 374 (1984).

Danzig, Richard J. "Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking." 36 *Stanford Law Review* 675 (1984).

Debevoise, Thomas M. "Sterry R. Waterman—An Appreciation." 9 *Vermont Law Review* 7 (1984).

Devins, Neal. "School Desegregation Law in the 1980's: The Court's Abandonment of *Brown v. Board of Education*." 26 *William and Mary Law Review* 7 (1984).

Esbeck, Carl H., and Larry M. Schumaker. "Current Practice Under 42 U.S.C. Sections 1985 and 1986." 11 *Barrister* 34 (Fall 1984).

Fish, Peter G. *The Office of Chief Justice*. University of Virginia (1984).

Goldberg, Arthur J. "The Proposed Constitutional Convention." 11 *Hastings Constitutional Law Quarterly* 1 (1983).

Lubet, Steven. *Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges*. American Judicature Society, 1984.

Mann, Bruce H. "The Formalization of Informal Law: Arbitration Before the American Revolution." 59 *New York University Law Review* 443 (1984).

Martineau, Robert J. "Frivolous Appeals: The Uncertain Federal Response." 1984 *Duke Law Journal* 845.

✔Nesbitt, Lenore C. "The Obligations of a Lawyer in Society." Commencement address, University of Miami Law School, Jan. 20, 1985.

Oakes, James L. "Judge Sterry R. Waterman." 9 *Vermont Law Review* 1 (1984).

✔Stevens, John Paul. Address at dedication of law library, Florida State University College of Law, Jan. 26, 1985.

"The Supreme Court, 1983 Term." 98 *Harvard Law Review* 1 (1984).

Taggart, Walter J. "The New Bankruptcy Court System." 30 *Practical Lawyer* 11 (December 1984).

United States Department of Justice, Antitrust Division. "Vertical Restraints Guidelines." Jan. 23, 1985.

Williams, George H., and Kathleen M. Sampson, ed. *Handbook for Judges: An Anthology of Inspirational and Educational Readings*. American Judicature Society (1984).

Wisdom, John Minor. "Foreword: The Ever-Whirling Wheels of American Federalism." 59 *Notre Dame Law Review* 1063 (1984).

Discrimination-Law Manual Errors Cited, Corrected

Judge Charles Richey (D.D.C.), author of the Center's *Manual on Employment Discrimination Law and Civil Rights Actions in the Federal Courts* (rev. ed. 1984), has discerned several errors in section H's procedural flow chart, which involves judicial review of alleged agency discrimination. At Judge Richey's request, in light of the growing importance of such review, the Center is making revisions to *Manual* pages H-26 and H-27 ("Procedural Flow Chart") available immediately.

Third branch personnel who already have a copy of the 1984 edition of the *Manual* may obtain the revised pages by sending a self-addressed, gummed label, preferably franked (but not an envelope), to the Center's Information Services Office, 1520 H St., N.W., Washington, DC 20005.

Note: Please be certain to include a notation that you are requesting the *February 1985 revised pages*. ■

CALENDAR

Mar. 6–7 Judicial Conference of the United States

Mar. 18–20 Civil Case Management Workshop

Mar. 20–22 Workshop for Judges of the Fourth Circuit

Center's Library Moves

The Federal Judicial Center's media library has moved within the Center's headquarters in Washington, D.C. The media library is now part of the Center's Division of Inter-Judicial Affairs and Information Services, and its direct-dial number is (202) 633-6365 or (FTS) 633-6365. Written requests should be addressed to Information Services, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. Attn: Media.

Validity of Recess Appointments Upheld

The judicial authority of judges with recess appointments was spelled out recently in an *en banc* Ninth Circuit decision rejecting a challenge to a drug smuggler's conviction.

The case stems from the recess appointment of Walter M. Heen to the U.S. District Court for the District of Hawaii on Dec. 31, 1980, while Congress was not in session. Article II of the Constitution gives the president power to make such recess appointments, which last until the end of the next session of Congress.

Judge Heen's nomination was withdrawn on January 21, 1981, and he served until the next session of Congress ended, on Dec. 16, 1981.

The issue of Judge Heen's authority arose when a woman convicted on drug charges in his court appealed one of his rulings. A Ninth Circuit panel, *sua sponte*, examined Judge Heen's authority, rather than the substance of his decision, and concluded that he was not empowered to decide the case. The panel's decision was overruled, 7–4, by an *en banc* panel in *United States v. Woodley*, No. 82–1028 (9th Cir. Jan. 14, 1985). The dissent was authored by Judge William A. Norris, who wrote the panel's decision and was joined by three other judges of the *en banc* panel.

Both the majority opinion and the dissent noted that the issue of a recess appointee's authority had arisen only once before, in *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), when the authority of such judges was also upheld. ■

PERSONNEL

Appointments

Emory M. Sneeden, U.S. Circuit Judge, 4th Cir., Nov. 30

Thomas A. Higgins, U.S. District Judge, M.D. Tenn., Dec. 3

. A. Little, Jr., U.S. District Judge, W.D. La., Dec. 4

Elevations

Bruce S. Jenkins, Chief Judge, D. Utah, Dec. 20

Scott O. Wright, Chief Judge, W.D. Mo., Jan. 1

Resignation

John A. Reed, Jr., U.S. District Judge, M.D. Fla., Dec. 31

Senior Status

Samuel P. King, U.S. District Judge, D. Hawaii, Nov. 30

Nauman S. Scott, U.S. District Judge, W.D. La., Dec. 4

Malcolm R. Wilkey, U.S. Circuit Judge, D.C. Cir., Dec. 6

Aldon J. Anderson, U.S. District Judge, D. Utah, Dec. 20

Oliver Seth, U.S. Circuit Judge, 10th Cir., Dec. 25

William E. Doyle, U.S. Circuit Judge, 10th Cir., Dec. 28

Thomas R. McMillen, U.S. District Judge, N.D. Ill., Dec. 31

Charles E. Stewart, Jr., U.S. District Judge, S.D. N.Y., Jan. 2

George C. Edwards, Jr., U.S. Circuit Judge, 6th Cir., Jan. 15

Robert L. Taylor, U.S. District Judge, E.D. Tenn., Jan. 15

Edward McManus, Chief Judge, N.D. Iowa, Feb. 9

Death

J. Robert Martin, Jr., U.S. District Judge, D. S.C., Nov. 14

JURORS, from page 2

the 1983–84 year. In the previous 12 months, 222,980 people served as grand jurors.

The Southern District of New York, with 53, convened the most grand juries in that period. The districts of Wyoming and North Dakota had only one grand jury each during the 12-month period. ■

Crime Bill Broadcast, Beamed by Satellite, Seen by Over 2,200

More than 2,200 judges, magistrates, other court employees, and federal prosecutors turned out for the multicity videoconference on new crime-control legislation produced by the Federal Judicial Center on Jan. 17.

The program, which was beamed by satellite linkup to 30 locations, originated in a television studio near Washington. Judges and other lecturers discussed different aspects of the Comprehensive Crime Control Act of 1984 and the Criminal Fine Enforcement Act of 1984, and engaged in several panel discussions. The viewing sites had telephone connections that allowed participants to call in questions for the faculty.

Videotapes of the conference have been sent to all district courts, to either the site coordinators—in those districts included in the broadcast—or to the clerks of court. A set of the tapes has also been sent to each circuit executive. Requests from interested viewers should be made to these local officials. ■

Position Available

Clerk of Court, U.S. Bankruptcy Court, Western District of Kentucky. Responsible for managing the administrative functions of the clerk's office, and overseeing statutory responsibilities of the clerk. Requirements include 10 years' administrative experience, including three years in a position of substantial management responsibility. Academic degrees and law practice may substitute for some experience requirement. Salary from $37,599 to $52,262. To apply, send resume by Mar. 18 to Luther D. Thomas, Clerk of Court, U.S. Bankruptcy Court, 414 U.S. Courthouse, 601 W. Broadway, Louisville, Ky. 40202. ■

Equal Opportunity Employer

MATTHEWS, from page 1

didn't seem to be a place in Mississippi where I could find work and also study law. I first went to Georgia where I taught piano at a place near Atlanta. There I took an examinntion for a position in Washington, and later was offered a position in the Veterans Administration. By then I was in Chicago so I received the notice after the time I had to report had expired. Finally, I got on the train, came to Washington, went into the Veterans Administration, and they put me to work.

How long did you stay at the Veterans Administration?

I stayed long enough for me to work and go to night school. It was until President Wilson had gone out of office and President Harding came in, around 1921. by that time I had passed the bar.

You went on the District Court for the District of Columbia in 1949. But in the meantime you did a lot of work to advance women's rights. What were you hoping to accomplish by picketing the White House while still a law student?

When I was in law school a woman came to me and asked if I could come and picket the White House for woman suffrage. Women didn't have suffrage then. I told her I couldn't come because I was going to be in law school at night and I was working during the day. I told her I had no time and she asked what I did on Sundays. She finally persuaded me to go over to the White House and to picket on Sundays. At that time you could go to the front of the White House, and you could carry a banner, but if you spoke you were arrested for speaking without a permit. So when they asked me why I was there, I didn't answer.

Even if they said, "How are you?"

Well, they didn't say, "How are you?" They would say, "Why are you here?" Now there was a Mrs. H.O. Havemeyer, who was the wife of a very wealthy man. This was a well-known name in New York. She started a fire out in front of the White House, so, of course, they arrested her and took her away in the "Black Maria" [paddy wagon]. I didn't want to be arrested because I was afraid if I were arrested that record of arrest would follow me. So, if the press or anyone else asked me why I was there, I didn't answer. I stood there with the banner and the banner had a message on it, of course.

How many pickets were there?

There were a good many. Sometimes they came from New York and Philadelphia and many other places. Fifty sometimes, 25 sometimes; they had a lot of people there.

What year was that, Judge?

It was 1919.

Do you remember what was on the banners you carried?

All of the banners we carried had on them statements that were related to women's rights. Some said women at a certain place did this, that or the other thing and so why not here. Women did have a lot of advantages in other places. In England, for example, they got the vote, but only women who were 30 years old or over could vote, whereas men could vote at 21. Much later, about 1925 I think it was, I went to England and I marched in a parade there. Lady [Viscountess] Rhondda invited a group of people from the Woman's Party here and we went. I carried a banner with another woman from the United States. She held one end of it and I held the other, and there was a very stiff wind. This banner said, "Women in the United States vote at 21, why not here?" As we passed, people along the route would shout, "Hear, hear!" At that time Mrs. [Emmeline] Pankhurst was living and they had a platform and benches in Hyde Park in London where all the speeches were made.

Do you think you accomplished anything in England?

Well, of course, but the women in England weren't exactly polite ladies like they were over here. They did annoying things to get their message across. For example, they put things in mailboxes that would stick to the hands—childish things like that. Of course, here in the United States, they did many things too. They visited the Senate Gallery and they would unfold a banner that had a message on it. I never participated in this sort of thing but that was being done at that time.

Do you think President Wilson ever saw you? Did he ever comment on your activities?

President Wilson finally was instrumental in getting the vote for women. But he and others had to be educated about certain things.

And you helped educate him?

I tried to.

Did you ever meet President Wilson?

No, I don't think so. I saw him but I never met him.

How long did you keep up your activities in the suffrage movement?

Well, it wasn't many years, because the suffrage amendment—the XIX Amendment to the U.S. Constitution—was finally passed in August of 1920.

Did you participate in activities other than picketing in front of the White House?

The National Woman's Party had activities and they asked me to help, so I did for a while. They would ask

"They asked him who the best man was to help them. . . . The story goes that this owner of the cafe said that the best man is a woman. That was me."

ne to look up legal matters and to ive advice. There were a lot of nings in Louisiana especially, but in ust about every state they had some ype of discrimination against omen.

The men's bar, right here in the District of Columbia, didn't even llow women to e admitted to the istrict of Columbia Bar Association.

I made an application with hree other omen for admission to the Bar ssociation here Washington, nd my check was eturned to me as believe theirs ere returned to em. [Judge Matews saved this ncashed check nd it, along with material denying er application, is now a part of the urnita Shelton Matthews Collection Radcliffe College, Cambridge, lass.] They said that our sponsors ad withdrawn their sponsorship. ut that wasn't true; they hadn't. nd these men who sponsored us l said that wasn't true. But, neverheless, they got rid of us in that ay and said we couldn't be admitd, and we weren't for a long, long me.

Now, take jury service here in Vashington. Women weren't alwed to serve on juries here for a ng time. I drew up for the Womn's Party a bill to allow women to erve on juries, and the bill passed. here were a lot of other discriminaons against women right here in e nation's capital. For example, ey had all kinds of discriminations gainst women in the inheritance ws.

But the legislation that finally assed goes to your credit?

It was pretty well known that I was working on it and after a while the Woman's Party gave me a retainer which was very much appreciated because, of course, all this other work that I had done for them, I had done as an individual and as somebody who was interested in the movement.

Representing the Woman's Party at the White House in 1932 were, from left: Burnita Shelton Matthews, Mrs. Harvey Wiley, aviatrix Amelia Earhart, Anita Pollitzer, and Ruth Taunton.

When you got out of law school did you remain at the Veterans Administration?

No. I didn't stay at the Veterans Administration. I rented a little office not very far from the old courthouse and engaged in private practice.

And your activities with the Woman's Party continued?

Well, yes, they did. I became their attorney. The Woman's Party was interested in getting laws passed in different states removing discriminations against women. I would draft the bills and send them to the person in charge of that in a particular state.

Were you continuously in private practice until you went on the court in 1949?

Yes.

You must have had extensive experience, then.

Well, there were a lot of condemnation cases at the time. For instance, this property right out here was privately owned, as was a lot of other property, including property where the statue of Senator [Robert] Taft now stands. All of that was taken by the federal government. They also took property for the addition to the Library of Congress. Then they took the National Woman's Party's property on Capitol Hill. I represented the party in that condemnation case. I got for them the largest award that was given in the whole condemnation. The Woman's Party property was a choice piece of property because it stood right across from the Capitol. Many other people also had their property condemned in that area. One day they went to a cafe owned by a man who knew all about this property, including property where the Supreme Court now is. They asked him who the best man was to help them with their condemnation cases. The story goes that the owner of the cafe said that the best man is a woman. That was me.

Why were they trying to get this particular piece of property?

Well, I suppose it was because of its close proximity to the Capitol. The government announced that they were going to take it. The Supreme Court was tucked away and housed in quarters in the Capitol. William Howard Taft, when he ceased being president, made it his business to try to get a location for the Supreme Court because he said the Supreme Court had been tucked away in corners in the Capitol long enough. At that time, they [the Justices] saw people in their homes. So I went to see Taft in his home when

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MATTHEWS, from page 7

he was the Chief Justice. I went to see him because the Woman's Party said I must, and that I must tell him that he should take some other property, not theirs. Most of the property owned by the Woman's Party had been given to them by Mrs. O.H.P. Belmont [formerly Mrs. William K. Vanderbilt]. I represented her in this condemnation, too, because they were taking her property, the same property that she had intended, eventually, to give to the Woman's Party to add to their other holdings.

Before President Truman nominated you to the U.S. district court in 1949, the late Judge T. Alan Goldsborough of the District of Columbia was quoted as having said that he felt that "Mrs. Matthews would be a good judge, but that there was just one thing wrong: She's a woman." Didn't you get incensed knowing what hurdles you had to jump to get on the court?

Well, yes, but I did have quite a bit of help. Through my work for the Woman's Party, I got to know a good many of the representatives and senators; so, when I was being considered for a judgeship, I was able to get the endorsement of a lot of senators. And India Edwards, at the Democratic national headquarters, was most helpful.

Harry S Truman: "This was one appointment about which I had no misgivings, only genuine satisfaction."

At that time, no woman had gotten a federal judgeship other than Judge Florence Allen, who was then on the U.S. Court of Appeals for the Sixth Circuit. Judge Allen was very good.

You knew Judge Allen?

Yes. She was a very handsome woman and she came down here when I was named to the court. She was a very friendly person and was anxious to see that women were helped in every way. Of course she was disappointed, and a lot of people were, that she wasn't named to the Supreme Court.

How did you select your law clerks, Judge?

Through resumes and through personal interviews. I had only one law clerk. Now a district court judge may have two law clerks.

"I wanted to show my confidence in women, so I always chose women [as law clerks]."

Did you select your clerks from special law schools?

No. But I never had a man; they were always women. The reason I always had women was because, so often, when a woman makes good at something they always say that some man did it. So I just thought it would be better to have women. I wanted to show my confidence in women, so I always chose women.

Before the president nominated you, Judge, did he discuss with you any problems he felt you might encounter as the first woman in the nation on a district court?

No, he never did. The only time I saw him after that was when I went up there one day to thank him for my appointment. Somehow I went on the wrong day. I don't know whether he made the mistake or I did; but, at any rate, we had a nice visit. When I became a senior judge, President Truman was still living. There was a very commendatory editorial that appeared in the [Washington] Post, which Mrs. Seaton, my secretary, sent him, and he acknowledged it in a letter and said, "This was one appointment about which I had no misgivings, only genuine satisfaction."

Did you encounter any prejudice from other judges or lawyers when you first came on the bench?

I can't reallly say that I did. The judges here were very helpful to me when I first came to the court. There was a serious space problem when I was appointed, and Judge Edward Tamm even vacated his chambers and let me use them on the day of my inauguration as a judge. As for Judge Goldsborough, he thought it was a great mistake to appoint a woman, but he told me later that he thought I had done a good job and he no longer resented the fact that I was a judge.

What kinds of cases did you handle during your early tenure?

We had an assignment commissioner then, Richard Collins, and he would talk over the assignments with Chief Judge [Bolitha] Laws and the chief judge would then determine to whom they were to be assigned. Once, Chief Judge Laws sent for me and wanted to know if I would take a case that had been assigned to another judge. He wasn't happy with the speed, or the lack of speed, that the other judge evidenced, and he asked me to take the case, and I took it. But I felt sorry afterwards that I took it because it was a most difficult case.

Do you remember which one it was?

Yes. It was one where a black man had invaded a building occupied by women, and he killed one woman. It was a mean case. It charged the offense in several different categories, which had to be differentiated; I regretted that I was so quick to accept Judge Laws' suggestion that I take the case.

When you took senior judge status, you sat in the court of appeals by designation. Did grappling with a case along with two other judges have any effect on your relationships with your brethren?

Insofar as the court of appeals is oncerned, I don't think that it did. I emember one case very well. It was patent case. I was told to write the roposed opinion even though the ther two judges didn't tell me what heir opinion was of the case.

You were to author the opinion nd circulate it to the other two udges?

Oh, yes, circulate it; after you get written, you circulate it.

Customarily you have a post-ench conference and decide not nly what goes into the opinion, but ho is to write it. You try to deter-ine what the others think about it t that point, or later when they ave had a chance to further study . But sometimes you don't have a hance to study it before you have is initial conference. And so at this me they said, "You write the opin-on." I was to write it, but they idn't tell me what I was to say. My roposed opinion became the unani-ous opinion of the court.

Why did you take the circuit as pposed to doing more work on the istrict court when you took senior tatus?

I served on both courts. I took the rcuit assignment because the chief udge of the court of appeals asked e to. He didn't say what case but st inquired whether I would sit on e court of appeals. You don't usu-lly specify the time. They just send e cases to you, and then you go on om there.

You did that in 1968, and you tayed there quite a while?

It was until 1977.

Did you ever feel that your au-hority as a judge was not fully ac-epted in the courtroom?

I never felt that way. I always had ontrol of my cases and my ourtroom.

Were there some cases especially nteresting to try?

Yes, and there are a lot of cases hat were dull. When I first came on he bench, they had all kinds of ases here. They even had divorce ases in the federal court. We had all the probate work—every bit of it—wills and contests of that kind. So, I've lived through all of that.

You have had some high-priced talent before your bench, including Leonard Boudin and Arthur Goldberg, and you have handled several very important cases, constitutional issues involved in naturalization cases; significant issues in administrative law cases; and others. Were there any cases which you remember best as making new law or that had special importance to the legal world?

> **"I always had control of my cases and my courtroom."**

Well, all the cases were important, if not to the legal world, then to the litigants themselves. I don't like to designate any as special.

One in particular did give me much personal satisfaction because had it gone the other way, I felt it would have been a great injustice. It involved Glover Park here in the District of Columbia. This property had been accepted for park purposes, and I saw no reason in the world for taking this property. I just felt it was wrong and ruled against the proposal, hence no freeway has ever been built through Glover Park, which remains today one of Washington's nicest park areas. ■

CHIEF JUSTICE, from page 1

tice explained, is nothing more than "a national *en banc* panel of nine judges. It is just that simple." He has proposed a temporary court in the past, most recently in his year-end report on the judiciary last December; the current proposal is a modification of those made by the Freund, Hruska, and Rosenberg reports.

The Chief Justice's proposal included an explanation of how the new court would be constituted and how it would function. The Supreme Court would select one judge from each of the 13 circuit courts. Nine judges would sit in two sessions a year of two weeks each, to hear cases referred by the Supreme Court; the other four judges in reserve would be available if any of the first nine were unavailable or disqualified. Review of the new court's decisions by the Supreme Court wouldn't be barred, but "I would risk a prediction that few cases would be granted further review," the Chief Justice said.

The Chief Justice maintained that such a panel would go a long way toward reducing the "avalanche of cases" the Supreme Court must now deal with in full Court opinions; in each of the last three terms, nearly 50 cases argued have involved intercircuit conflicts. He noted that the number of written opinions the Court issues—which he called "the best single measure" of the Court's workload—had gone from 65 to more than 150 in two decades. The removal of intercircuit-conflict cases could cut the caseload by about a third.

The new panel would also not cost any significant amount, aside from the judges' travel expenses, since the Court of Appeals for the Federal Circuit has tendered its courtroom, and that court's staff and the Supreme Court's could readily absorb the additional clerical work required.

Chief Justice Burger explained that his conception of the new intermediate court was a "modification" of plans advanced more than a decade ago by a study group headed by Professor Paul A. Freund under the auspices of the Federal Judicial Center, and a congressional commission headed by Sen. Roman Hruska. Similar proposals were introduced in Congress in 1981, 1982, and 1983. In the last session of Congress, subcommittees in both the House and Senate favorably reported bills with similar such provisions out to their full judiciary committees. ■

NOTEWORTHY

New methods. Efforts to get judges to employ alternative dispute-resolution techniques in litigated cases will be promoted in a new program sponsored by a group devoted to finding alternatives to litigation.

The goal of the campaign, known as the Judicial Project, is to make both federal and state judges more aware of, and thus more willing to use, alternative dispute-resolution methods. It is sponsored by the New York City-based Center for Public Resources' Legal Program.

The Legal Program will sponsor workshops, seminars, and publications on alternative dispute-resolution methods and how they can be implemented. Funds will also be provided for academic research on the topic.

The Legal Program is composed of law professors and attorneys in private practice. The Judicial Project's advisory committee includes practitioners, professors, and members of the judiciary.

* * *

Old methods. You *can* please most of the people most of the time—at least that's what the clerk's office in the District Court for the District of Columbia has found.

A poll taken by the clerk's office in November revealed that 91 percent of those who have business in the court rated the service of the staff of the clerk's office as "excellent." Another 7 percent called the service "very good," while 1 percent called it "average," and 1 percent called it either "fair" or "poor." The written questionnaire focused on whether the clerk's office employee was courteous, efficient, and able to answer questions or willing to seek assistance if he or she could not be of help.

* * *

New rules. The U.S. District Court for the Northern District of Georgia has revised its local rules. The extensive revision was prepared by a committee of four of the court's judges.

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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udicial Conference Lifts Time Guidelines overning Selection of Law Clerks

The Judicial Conference has de-ed not to extend time restrictions judges' hiring of law clerks, opted experimentally two years o.

Elimination of the nonbinding idelines leaves judges free to in-view and select clerks at any time. The guidelines, originally promul-ed in 1983, called for judges not accept applications for clerkships til Sept. 15 of a student's third ar. The deadline was later nged to July 15, following a stu-nt's second year.

The Conference's decision not to end the guidelines followed a vey conducted by the Federal Ju-ial Center that found judges al-st evenly split over whether the licial Conference should be in-ved in setting policy on hiring law clerks. The views of the judges were even more divided on what the guidelines should provide, if any were adopted.

The survey also found that more judges in the Northeast and mid-Atlantic regions favored guidelines, while fewer in other areas did.

Many judges who favored keeping a cutoff date suggested an earlier date so they could meet competition from law firms that made decisions before the judges could act under the present schedule.

Many judges who opposed guidelines said that they felt the Judicial Conference should not be involved in the matter. Others said that the guidelines were impractical because they were voluntary, and that the judges who did not observe them frustrated the process. ■

hief Judge Donald P. Lay Describes "Blueprints r Judicial Management" in Eighth Circuit

hief Judge Donald P. Lay took his on the Eighth Circuit bench on . 26, 1966, and became chief judge Dec. 31, 1979. He attended the ted States Naval Academy and later ived both a B.A. and a J.D. from the versity of Iowa.

rior to his court service, Judge Lay ticed law in Omaha and Milwaukee. He has lectured at the National Judicial College and currently teaches at the University of Minnesota Law School and the William Mitchell College of Law. Besides enjoying teaching, the judge firmly believes in what Chaucer referred to years ago—that one who teaches learns.

Chief Judge Donald P. Lay

You are nearing your 20th year on the bench and have seen many changes in the judicial system. What one change do you think is the most remarkable? Over this period, what significant substantive change have you observed in the role of the federal judiciary?

First, from an administrative point of view, I think the most remarkable change that I have seen in almost 20 years is the ability of the courts to take on new and innovative approaches in the decisional process in handling the large growth of litiga-

See LAY, page 4

Judge Arlin M. Adams

Judge Arlin M. Adams Named to FJC Board

Judge Arlin M. Adams of the Third Circuit has been named to a four-year term on the Board of the Federal Judicial Center by the Judicial Conference.

Judge Adams was appointed to the circuit court in 1969. He is a graduate of Temple University and the University of Pennsylvania Law School, and holds a master's degree from Temple.

Judge Adams was Pennsylvania's secretary of public welfare from 1963 to 1966 and currently serves on the Judicial Conference Committee on the Judicial Branch. Judge Adams will replace Judge Cornelia G. Kennedy of the Sixth Circuit, whose nonrenewable term expired last month.

Judge Adams is a member of the American Law Institute, the American Bar Foundation, the American Judicature Society, and the American, Philadelphia, and Pennsylvania

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Inside . . .

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Summary of Actions By Judicial Conference ... p.3

Employment Bias Supplement Published

The Center recently published a supplement to George Rutherglen's *Major Issues in the Federal Law of Employment Discrimination* (FJC 1983). This 70-page supplement covers developments in employment discrimination case law from September 1983 to August 1984. It also contains a bibliography of recent books and articles and a table of authorities cited in both the supplement and the 1983 monograph.

Among the topics discussed are preferential treatment; claims of disparate treatment, disparate impact, and sexual discrimination under title VII of the Civil Rights Act of 1964; procedural provisions of title VII such as statutes of limitations; and regulation of recipients of federal funds.

Copies of the supplement can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope). ■

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bar associations. He is a former president of the American Judicature Society and has served as chancellor of the Philadelphia bar and as a member of the house of delegates of the Pennsylvania and American bar associations. ■

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Joseph F. Spaniol, Jr., Deputy Director, Administrative Office of the U.S. Courts.

Two Courts Differ on Seizure of Legal Fees

Two courts have issued differing opinions on whether the Comprehensive Forfeiture Act of 1984 permits the government to seize legal fees paid by a defendant who is later convicted.

A district court in Denver held in January, in *U.S. v. Rogers*, 84–CR–337, that such fees were not forfeitable. Last month, in *U.S. v. Payden*, No. M–11–188, a Southern District of New York court held that such fees are subject to seizure.

The new legislation, codified at 18 U.S.C. § 1963, is an amendment to the Racketeer Influenced and Corrupt Organizations Act (RICO) and provides that assets of a person subsequently convicted of racketeering are subject to forfeiture. The relevant assets are not those on the date of conviction, but those at the time of the acts on which a later conviction is based. Assets transferred after the time of the act are subject to seizure from the recipients, with certain exceptions.

Judge John L. Kane (D. Colo.), ruling on a motion to exclude attorneys' fees from any possible forfeiture, found that Congress intended to subject assets in a third party's hands to forfeiture only if those assets were transferred "as some type of sham or artifice.... The attorney who receives funds for bona fide services rendered engages in neither a fraud or a sham."

The issue of seizure was not directly raised in the New York case, which arose from a defendant's motion to quash a subpoena to his attorney seeking information about the lawyer-client fee arrangement. The information was being sought to show the availability of profits from narcotics trafficking. One of the arguments the defendant raised was that the requested disclosure might lead to forfeiture of the fee, and that the threat of such forfeiture deprived him of his right to counsel.

In making that argument, the defendant cited *Rogers*. Judge David N. Edelstein ruled that "Rogers cannot be accepted as the law in this district. In the same manner that a defendant cannot obtain a Rolls-Royce with the fruits of a crime, he cannot be permitted to obtain the services of the Rolls-Royce of attorneys from these same tainted funds." ■

Ninth Circuit Workload Study Published by FJC

The Center recently published *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project*, by Joe S. Cecil of the Center's Research Division.

In an effort to improve court performance, the Ninth Circuit in 1982 adopted a series of procedures collectively known as the "Innovations Project." The project included a commitment by each of the judges of the circuit to accept a substantially increased workload. In addition, three major innovations were implemented to expedite the handling of appeals: the Submission-Without-Argument Program, the Prebriefing Conference Program, and changes in the calendaring of arguments.

The report outlines the project and reviews its effect on case processing and on the judges and their workload. It concludes that the Innovations Project has substantially reduced disposition time in the Ninth Circuit. The court had no backlog of cases ready for argument at the end of the 1984 statistical year—a tribute to the judges—but there were still more than 4,300 cases, or 573 per panel, pending in the circuit on that date.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked. ■

Judicial Conference Supports Proposed Action on Immunity

The Judicial Conference voted last month to support state judges' requests that Congress immunize them from liability for attorneys' fees stemming from their official actions.

The state judges are concerned about the Supreme Court's 1984 decision in *Pulliam v. Allen*, 104 S. Ct. 1970 (1984), which held that a plaintiff who was entitled to injunctive relief against a state magistrate under the Civil Rights Act was entitled, under the act, to recover attorneys' fees from the official.

The Conference of [State] Chief Justices earlier approved a resolution calling on Congress to change the civil rights law to provide immunity for state judges. The Judicial Conference's Committee on Court Administration noted in its report to the Conference that the state judges' group had urged the Conference to support the proposed legislation.

In other developments at last month's session, the Conference:

- Received its Court Administration Committee's report unanimously approving the most recent version of the Five-Year Plan for Automation in the United States Courts. This plan includes estimates of when projects already under way will be completed.
- Made public a list of 106 district court and circuit court vacancies as of March 1. Eighty-five of these are judgeships created by Congress last year, and nine nominees have been named to them so far. Of the remaining twenty-one vacancies, which were created by retirement, resignation, elevation, or death, only two nominations for successors have been named. One of the judgeships for which no nomination has been made has been vacant since October 1983; two others have been vacant since January 1984. Attorney General Edwin Meese, who was sworn in February 25, has pledged that filling vacant federal judgeships will be one of his highest priorities.
- Elected Judge Jack R. Miller of the Court of Appeals for the Federal Circuit to replace Chief Judge Howard T. Markey of the same court on the Board of Certification, which certifies circuit and district executives.
- Approved changes to two bankruptcy rules that would alter the restrictions on appointments made by bankruptcy judges and the disqualification of such judges. Consistent with the Canons of Judicial Ethics, rule 5002 was amended to allow a bankruptcy judge to appoint someone related to another bankruptcy judge in the same district. The prohibition against a judge's appointing anyone he or she is related to remains in effect. The amended rule would also allow appointment of someone in the same firm as, or associated with, a person who is disqualified from appointment by virtue of a connection to the appointing judge. Rule 5004 was amended to make clear that disqualification of bankruptcy judges is governed by 28 U.S.C. 455, which spells out the criteria governing judges' disqualification of themselves. The amended rules now go to the Supreme Court for approval, and then to Congress.
- Authorized free distribution of copies of local rules of the district courts.
- Voted to recommend to Congress that a district executive be authorized for any district with eight or more judges.
- Approved changes in the procedures for reporting cases under advisement or submission, beginning with the report due next September. The reports will now be sent to the circuit executives, rather than to the AO.
- Authorized the Ad Hoc Committee on American Inns of Court to proceed with plans to create a private, nonprofit American Inns of Court foundation in the District of Columbia. The foundation would charter new Inns of Court and coordinate their activities. ■

Douglas D. McFarland, left, has been named this year's Tom C. Clark Judicial Fellow, a special designation for one of each year's Judicial Fellows, which were started in 1977 following the death of Justice Clark, the first chairman of the Judicial Fellows Commission. The Hon. Kenneth Rush, a member of the selection commission and former ambassador to France and Germany, presented the award.

LAY, from page 1

tion that has occurred since 1966. For example, when I was appointed, in my own circuit we processed approximately 400 cases a year. Our procedures were in the "horse-and-buggy" days; we would hear argument in three cases a day for one week a month, or about 15 cases a month. Each case received a full 30 minutes of argument, and a full opinion was written on each case. We have experienced tremendous increases in case filings; in the Eighth Circuit we will process approximately 2,000 cases this year. All circuits have experienced a similar rise in filings. In spite of these increases the circuit courts have done a tremendous job in expediting and managing the case flow. In studying the opinions of the other circuits I think each court of appeals has innovated new procedures and yet has maintained quality in the decisional process.

As to the most significant change in the substantive role of the judiciary, I would point to the overall concern of federalism—that is, the current deference and comity within the federal system given to the states in many areas of the law. Today, the pendulum has swung the other way. Instead of the federal judiciary assuming the guiding role under the U.S. Constitution, the states are given an equal or dominant role. This has not been achieved without a good deal of tension. For example, today there are many procedural obstacles for state prisoners to come into federal court: (1) total exhaustion of all state remedies; (2) whether a prisoner is precluded from coming into federal court by reason of a state procedural bypass rule; (3) whether there might be "cause" for failure of the petitioner's attorney to make a contemporaneous objection; and (4) if there was cause, whether that was "prejudice" to the petitioner. These procedural obstacles have not deterred state prisoners from filing lawsuits. They have resulted in causing greater work for the district courts and the courts of appeals. The great percentage of these cases could be disposed of very easily on the merits; however, before we reach the merits the lower federal courts have to initially pass on the many procedural concerns.

In so many of these cases we could decide the merits very quickly. Handling habeas cases in the late 1960s and 1970s was much easier for the courts. I think the majority of federal judges find many of the procedural rules are counterproductive. This is perhaps one of the most significant changes we have encountered in the federal judiciary in the last 20 years.

Are you saying large numbers of habeas corpus filings continue in the federal courts?

We still see as many habeas cases filed by state prisoners as in the past. Today they are most often not as successful, but at the same time they are not all frivolous. Many judges feel that some of the states' procedural rules need further analysis in terms of impact upon the federal judicial system. Many of these rules are causing excessive concentration of time and research by the lower federal courts.

In a recent law review article, you made it clear that you are with a minority of federal judges who favor retention of diversity of citizenship jurisdiction. Why do you favor retention of diversity jurisdiction?

Many federal judges favor the abolition of diversity of citizenship jurisdiction. On the other hand, the American Bar Association and the American Trial Lawyers Association have opposed this. I am in favor of raising the jurisdictional amount in diversity cases from $10,000 to $50,000. Otherwise, I oppose abolition of diversity jurisdiction.

First, I know the Conference of Chief Justices has stated that the state courts can handle the shift of responsibility. However, I have talked to many state judges across the country, and many just shake their heads and say that their system is so overcrowded right now that to take on diversity cases from the federal district courts would, in some instances, simply break the system down.

There are many other reasons why diversity cases should remain in the federal courts. One relates to the logistics of trying cases in rural areas. If you had to try a sophisticated product-liability case in Broken Bow, Nebraska, the problems in having witnesses travel from MIT or California to Broken Bow are insurmountable. Some rural county seats may be 300 miles from the nearest airport. The logistics of having physicians and specialists attend trial would be disheartening. The cost to try a sophisticated malpractice or product case in rural areas would be horrendous.

Another reason to retain diversity cases in federal courts is the problem presented by mass tort litigation. The federal judge who is appointed by the multidistrict litigation panel has the authority under title 28, section 1407, to bring all federal cases from across the nation to a central place for pretrial adjudication of discovery, pretrial motions, and management of class-action cases. We can do that in the federal system, but the state systems do not have the authority to manage cases filed in other states. A state court does not have authority to issue process beyond its own state borders. It is essential that we maintain the capacity to expedite and adjudicate preliminary procedures through a single judge in a multidistrict assignment. We couldn't do that if we abolished diversity jurisdiction in federal courts. All of these cases would have to be tried separately in each state. If diversity jurisdiction were abolished in federal courts, it would be essential to provide an exception for a federal forum to try mass tort cases. I frankly cannot perceive how Congress could draft a bill to provide such an exception.

If diversity jurisdiction is abolished in the federal courts, you said, "The role of the federal court in the social and economic fabric of America will become secondary in the eyes and minds of a vast number of lawyers." Are you saying, in essence, that the federal courts feel a responsibility to influence the interpretation of states' common law?

I don't think federal judges have a responsibility any more than any other judge. But, if federal judges are handling diversity cases, they obviously have the duty to impose the law of the particular state under *Erie R.R. v. Tompkins*. All federal trial judges are experienced lawyers in their respective states, and some are former state judges who have a great working knowledge of what the state law is. There are many cases throughout the country where the opinions of the federal courts have made major contributions to state law. Consider, for example, the second-collision injury cases involving automobile manufacturers. Our circuit court had one of the first cases in this area. This was the case of *Larson v. General Motors*. The law in this case has been adopted by practically every state in the country. When I was a lawyer we had a great district judge in the state of Iowa, Henry Graven. Judge Graven once wrote about a 60-page opinion in a case called *Russell v. Turner* on the Iowa Guest Statute. This was a compendium of all gross negligence and guest passenger cases in Iowa. It became almost a bible for state judges thereafter. So federal judges have added a good deal to the law of a particular state. I have never heard any resentment by state judges of a federal court passing on state law.

The Administrative Office reports that statistics on all the circuits show that the Eighth Circuit has had the largest percentage increase in filings since 1979, an increase of 89.5 percent. What has your circuit done to cope with this substantial increase?

Over the years our court has studied different ways and means to maintain a current docket. I know that many other circuits have innovative ways of handling cases, and our procedures are not too much different from what others have done. Two common things that have been done in practically every circuit are

Chief Judge Donald P. Lay

the screening of cases and the development of staff law clerks who work on pro se litigation and non-argument cases. It's interesting to note that from 1966 to about 1970 we had one staff law clerk; now we have 10 staff law clerks, including a general staff attorney.

We have also used two or three other innovative ways to keep our docket current. We have a civil appeals mediation plan where our court attempts to bring the lawyers together in order to try to settle cases before the briefing. These cases basically involve money judgments. We are generally successful in settling close to 100 cases a year through this process. This is equivalent to the work of one judge.

Also, we have adopted a new procedure which we call the expedited docket. Each month we have three panels hear approximately eight 10-minute cases. These cases are preliminarily screened out as single-issue cases; they generally do not require a full opinion. This has helped us process more cases. We also have assigned one of our deputy clerks to serve as an appeals expediter. The appeals expediter primarily manages a case the moment that it is filed; he works with the lawyers and the court reporter on the briefs and the transcripts and makes certain the cases move along at an expeditious rate. Where several parties are involved he attempts to avoid duplication of briefs on common issues and attempts to consolidate briefs. This procedure has been a tremendous assistance to us. This also allows us to see that the cases are expeditiously processed from the notice of appeal to the time of submission. The lawyers are seldom given continuances, the court reporters are not given continuances. It serves as an overall management program much like the district courts do under F.R.C.P. 16(b). In other words, the attorneys meet with the appeals expediter and decide what can be done to expedite the briefs and expedite the appeal so that the case can be submitted at the earliest time possible.

We have tried one other approach that I think has proven very helpful. Our staff attorneys supervise all section 1983 cases and postconviction cases from the moment the notice of appeal is filed. They immediately obtain the district court record and determine on the basis of this record whether in their judgment the appeal, based upon what the district court has written, might possibly be frivolous. If they find any case along that line, it is submitted to a panel of judges, who then decide whether an order to show cause should be issued as to why the appeal should not be dismissed as frivolous. We are able to screen out a good many cases this way; however, we give the petitioner a full opportunity to address the issues that he feels are meritorious. We have a committee that is constantly working on new ideas as to how to maintain a current docket. We are proud of our record. At the end of our June 1984 calendar we had only 15 pending cases that were fully briefed and ready for submission. I think it is essential for the federal courts to main-

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tain an expeditious process. I am pleased to say that, notwithstanding the large increase, we have been able to do that in the Eighth Circuit.

What time period do you set on disposition of a case after it has been heard by a panel?

Well, we don't have any arbitrary limit, but we are all aware of the Administrative Office and the Judicial Conference requirement that we try to decide these cases within 90 days. We can't do this in every case—some are going to take longer. Conversely, many of them take much less time, but we certainly strive for a 90-day ruling. I think we rank first or second in at least getting the case up for a hearing and then disposition. I think our appeals expediter helps a good deal in the front end of the appeal in getting the case ready.

To what extent can you, as chief judge of the circuit, exert your influence over the trial judges? For example, you have said that the opinions of the trial judge should be short; that the opinions should be based on "qualitative reasoning" but not "unnecessarily belabor the thought process" behind the reasoning, leaving the precedent-setting to the appellate courts. As a practical matter, if a trial judge in your circuit were to insist on long, rambling opinions, how can you get the word to the judge that opinions should be shorter?

The district court workshops sponsored by the Federal Judicial Center stress the fundamentals of good craftsmanship and decision making. District judges are not the only ones who should be concerned about long opinions—circuit judges and, in all due respect, the justices of the Supreme Court should be as well. I certainly would not, as a chief judge, go directly to a judge and tell him his opinions are too long. I can understand that district judges are very sensitive towards their own independence and that they don't like anyone telling them what to do. I think the best way to approach change is that when you see a problem, particularly where you see a district judge is not getting his work out on time, is to go to that judge and say, "What can we do to help you? This is not in any way a criticism, but if there is a need for a temporary law clerk, perhaps we can obtain one for you. Is there a need for an outside judge to come in and help you?"

I have found that judges should be given every encouragement and every assistance, and if you approach problems in that way they are more easily solved. It's a learning process for all of us. One of my district judges once said to me that circuit judges are the natural enemy of the district court. I think this is unfortunate. Yet, it's human nature to want to be right. It takes application of human psychology to suggest new ideas. It's very difficult for older, experienced judges to learn new ideas. For example, when the new F.R.C.P. 16(b) relating to scheduling conferences was first debated, every district judge resented it as an intrusion on their own procedures. Yet now, I think, through educational programs and the process of observing other district judges conduct scheduling and management conferences, judges who earlier opposed the rule are now saying, "Hey, this isn't a bad idea. I think I'll try it."

How often do you meet with the trial judges in your circuit?

Well, I have two meetings a year with our chief judges, and we have two meetings a year with the Judicial Council. In our circuit five district judges are on the council. We have the invaluable sentencing institutes and the district court workshops put on by the Federal Judicial Center. Overall I think there is close comradery in our circuit, and we keep in pretty close touch with one another.

Each of your districts has been developing "blueprints for judicial management." How is this working?

Well, here again, it's just an idea to list as many innovative procedures that the district judges can experiment with to process the work expeditiously. For example, some district judges are trying to limit their opinions to no more than 10 pages and to limit the lawyers' briefs in routine cases to no more than 10 pages. This is a very flexible rule but many of our district judges have been doing this, and it's worked out very well.

Other ideas have been that they try to consolidate motions for a preliminary injunction with a motion for a permanent injunction so that the whole issue is ripe for the court of appeals in one appeal. Another suggestion has been to enter an order to show cause why all three-year-old cases should not be dismissed for the failure to further process the case. I have encouraged our districts to rule on all motions within 10 days. That's an idea that many of our district judges are trying out and finding successful. All district judges should try to expedite motions because lawyers continually complain that if a motion is held for any undue length of time by a district judge it can stall the whole litigation process. So it's just a matter of troubleshooting and hopefully getting all district judges to feel pride in what they are doing and to pursue to the end everything they can to improve the administration of justice. There is great comradery yet competitiveness among the districts

"It is essential for the federal courts to maintain an expeditious process."

to have the most current reports.

Would you explain the formation and operation of the federal practice committees that serve your circuit? How do they function and what benefits are gained from their existence?

Although I have been on the court for almost 19 years, my best friends are still lawyers, and I have great empathy for the trial bar. For the judicial process to be properly managed, the bar has to understand that they have a working responsibility to be a partner with the judiciary in helping to formulate rules and in helping to understand scheduling problems. There is a mutual reaction here. In other words, the judiciary must also understand the needs and problems of lawyers. About three years ago we formed what we call federal practice committees of 15 to 20 people in each district. We tried to have a cross-sectional representation on these committees—young lawyers, old lawyers, plaintiff lawyers, members of minority groups, defense lawyers, criminal defense lawyers, prosecutors, public defenders, and United States attorneys. We

"The bar has to understand that they have ... to be a partner with the judiciary."

also bring in one or two of the deans or faculty members of law schools. These people meet twice a year. They are funded through our lawyers' fund, which the court maintains. They talk over ideas with the district judges, they develop new rules, and from these committees we draw upon them for our Federal Advisory Committee, which functions for the circuit.

One of the things each Federal Practice Committee is doing now is establishing a historical society within each district. Lawyers are given a forum for the first time to talk to judges about problems within the districts, i.e. scheduling problems, rules, and so forth. Before these committees were organized, a lawyer was reluctant to go in and talk to a judge about such matters. He couldn't communicate with the judge, and so we've tried to break down that barrier. I think it's worked very successfully. Each Federal Practice Committee tries to put a seminar on within their district once a year on federal practice. This complements the Chief Justice's concern to train competent, federal lawyers with an educational process available to the whole bar. This ties in as well with the fact that in the Eighth Circuit our judicial conferences are open conferences. Any lawyer who is an active federal practitioner is invited to come to our conferences. Our conferences have grown from about 100 people up to about 600. They are informational conferences, and they all participate. We have one whole afternoon when all registrants participate with the federal practice committees and visit with the judges and discuss problems within the district.

How do you decide who may attend your judicial conferences?

We try to turn the registration over to the federal practice committees. But our rule is that any lawyer who wants to come can come. We've really had no problems. We were worried that it was going to mushroom on us and get too large. However, we haven't had that problem. We're large, but I think everybody has a good and great learning experience. We have done away with invitations. If any lawyers want to be on the mailing list, they receive the registration material. In this way we avoid the reputation of selectively discriminating within the bar.

Is there any area of the law that you feel has lagged behind the needs of our society?

Yes, and I feel very strongly about this. As a nation we do not exercise the proper judgment and wisdom in our system of penology. I know this is a favorite subject of the Chief Justice, and it's been a private interest of mine for many years. We afford every process that is due to people charged with crimes in this country, but once they are sentenced we more or less shut the door and forget about them. Our treatment of

"Most of our treatment of prisoners ... remains barbaric."

prisoners in the state and federal system, in my judgment, remains barbaric. We defeat our very purpose in sending people to prison. It's probably an old cliche, but there's no question about it, when a person is put into prison we really go through a process of dehumanization. We treat them as numbers. We afford prisoners few rights and we, in effect, "breed crime" in our prisons. I think the figures show that in our state systems it costs about $11,000 a year to maintain a state prisoner; I think it's close to $15,000 to $16,000 a year in our federal prisons. Society must be convinced that our treatment of prisoners must change. The public has to be convinced because they're the ones that can influence the legislatures.

Instead of treating prisoners like animals, removed from society, we should be developing some type of a community treatment program where we work with individuals in a way that will help restore their self-respect and provide vital work for them in a community. This can be done, and it can be done very easily. Some day our prisons will be dis-

See LAY, page 10

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

✔American Bar Association, Judicial Administration Division. "The Bicentennial of the United States Constitution—an International Comparison of the Role of the Judiciary." American Bar Association (1985).

Currie, David P. "The Constitution in the Supreme Court: Limitations on State Power 1865–1873." 51 *University of Chicago Law Review* 329 (1984).

Eshleman, Dirk E. "Pro Se Appeals in the Fifth Circuit: The Gradual Demise of the Notice Exception to Federal Rule of Appellate Procedure 4(a) and an Argument for Its Resurrection." 4 *The Review of Litigation* 71 (1984).

Fullerton, Maryellen. "Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts." 79 *Northwestern University Law Review* 1 (1984).

Gibbons, John J. "Federal Law and the State Courts 1790–1860." 36 *Rutgers Law Review* 399 (1984).

Ginsberg, Ruth Bader. "The Work of Professor Allan Delker Vestal." 70 *Iowa Law Review* 13 (1984).

Gordon, Nicole A., and Douglas Gross. "Justiciability of Federal Claims in State Court." 59 *Notre Dame Law Review* 1145 (1984).

Henry, James F. "Mini-Trials: An Alternative to Litigation." 1 *Negotiation Journal* 13 (1985).

Hunter, James, III. "Judge Collins J. Seitz." 70 *Virginia Law Review* 1547 (1984)

Jenkins, John A. "The Partisan: A Talk with Justice Rehnquist." *New York Times Magazine*, p. 28, Mar. 3, 1985.

Kaiser, D. Nolan. "Juries, Blindness and the Juror Function." 60 *Chicago Kent Law Review* 191 (1984).

Kennedy, Edward M. "The Sentencing Reform Act of 1984." 32 *Federal Bar News & Journal* 62 (1985).

Komesar, Neil K. "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis." 51 *University of Chicago Law Review* 366 (1984).

LaFave, Wayne R. "'Seizures' Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds and Search Issues." 17 *Journal of Law Reform* 417 (1984).

Lay, Donald P. "Zen and the Art of Trial Lawyering." 19 *International Society of Barristers Quarterly* 287 (1984).

Levin, A. Leo. "Collins J. Seitz: Creative Judicial Administrator." 70 *Virginia Law Review* 1551 (1984).

McCarthy, Coleman. "The Year of the Executioner." Washington Post, Jan. 26, 1985, reprinted in *Congressional Record* Jan. 31, 1985, p. S879.

Mikva, Abner. "What's Good About Lawyers." 9 *District Lawyer* 18 (November 1984).

Nader, Laura. "A User Theory of Law." 38 *Southwestern Law Journal* 951 (1984) (Fourth annual Alfred P. Murrah Lecture).

Newman, Jon O. "Rethinking Fairness: Perspectives on the Litigation Process." 40 *Record of the Association of the Bar of the City of New York* 12 (1985).

Olson, Susan M. "Challenges to the Gatekeeper: The Debate Over Federal Litigating Authority." 68 *Judicature* 70 (August 1984).

Poulin, Anne Bowen. "Evidentiary Use of Silence and the Constitutional Privilege Against Self-Incrimination." 52 *George Washington Law Review* 191 (1984).

Rodino, Peter W., Jr. "New Help for Crime Victims." 32 *Federal Bar News & Journal* 88 (1985).

Schlueter, David A. "Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges." 59 *Notre Dame Law Review* 1079 (1984).

Van Dusen, Francis L. "Comments on the Volume of Litigation in the Federal Courts." 8 *Delaware Journal of Corporate Law* 435 (1984).

Weinstein, Jack B. "Justice and Mercy—Law and Equity." 28 *New York Law School Law Review* 817 (1984).

Welsh, Robert C. "Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long." 59 *Notre Dame Law Review* 1118 (1984).

Wisdom, John Minor. "A Federal Judge in the Deep South: Random Observations." 35 *South Carolina Law Review* 503 (1984).

Wright, J. Skelly. "In Praise of State Courts: Confessions of a Federal Judge." 11 *Hastings Constitutional Law Quarterly* 165 (1984).

CALENDAR

Apr. 1–3 Sentencing Institute for the Fifth and Seventh Circuits
Apr. 1–3 Workshop for Fiscal Clerks of Circuit, District, and Bankruptcy Courts
Apr. 8–10 Workshop for Appellate Court Case Management
Apr. 10–12 Seminar for Federal Public and Community Defenders
Apr. 15–17 Workshop for Clerks of Circuit Courts
Apr. 17–19 Seminar for Bankruptcy Judges
Apr. 17–19 Workshop for Training Coordinators
Apr. 22–24 Workshop for Estate Administrators of Bankruptcy Courts
Apr. 23–26 Video Seminar for Newly Appointed Magistrates
Apr. 24–26 Pretrial Services Officer Training
Apr. 28–May 1 Seminar for Newly Appointed Federal Appellate Judges

Spanish/English Interpreter Exam Set

Written examinations for Spanish/English interpreters will be given in 36 cities in June. Those who pass the test, and an oral examination, will be placed on a certified list from which full-time interpreters are selected. The salary for full-time interpreters is $24,011 to $34,292. Free-lance certified interpreters earn $175 a day.

Applicants should apply by April 26 to Dr. Roseann Duenas Gonzalez, Director, Federal Court Interpreters Certification Project, College of Arts and Sciences, Modern Language Building, University of Arizona, Tucson, AZ 85721, enclosing a $25 application fee and requesting one of the available sites for the written and oral examinations. The application letter should include date of birth and Social Security number.

The written examinations will be given on June 1 in Albuquerque, Atlanta, Baltimore, Boston, Brownsville, Tex., Chicago, Corpus Christi, Tex., Dallas, Fort Worth, Fresno, Cal., Hartford, Houston, Laredo, Tex., Las Cruces, N.M., Las Vegas, Los Angeles, Miami, Monterey, Cal., Newark, N.J., New Orleans, New York, Orlando, Fla., Phoenix, Reno, Sacramento, Salt Lake City, San Antonio, Tex., San Diego, San Francisco, San Juan, P.R., Santa Fe, Seattle, Trenton, Tucson, Washington, D.C., and West Palm Beach, Fla. The oral test will be given in August and September in Albuquerque, Atlanta, Boston, Chicago, Houston, Los Angeles, Miami, New Orleans, New York, Phoenix, San Francisco, San Juan, and Washington, D.C.

Navajo Glossary Available

An English/Navajo legal glossary as been published by the U.S. Dis- ict Court for the District of New lexico. Court clerk Jesse Casaus id it might be useful in more than dozen federal, state, and tribal urts. For copies, write Mr. Casaus, ox 689, Albuquerque, NM 87103.

Courts' Workload Rises Again, AO Reports

The workload of the circuit and district courts grew again in the latest statistical year, an Administrative Office of the U.S. Courts study has found.

The report, prepared by the AO's Statistical Analysis and Reports Division, covers the 12-month period that ended last September.

Highlights of the summary included:

- The number of appeals docketed by the 12 circuit courts increased 6.5 percent, while the number of dispositions was up 4.6 percent. The largest increase in filings—16.7 percent—was in the Eleventh Circuit. The Seventh Circuit had the largest drop in filings, which were down 2.8 percent. The Eighth Circuit had the largest increase in dispositions, at 17.7 percent, while the Ninth Circuit had the largest drop, at 3.5 percent.
- The U.S. Court of Appeals for the Federal Circuit, for which separate figures are kept, had a 38.5 percent increase in appeals filed. However, the court terminated 66.8 percent more appeals.
- The district courts kept nearly even in handling an increased civil caseload. Those courts received 3.6 percent more cases in the period surveyed and disposed of 3.5 percent more. The Eastern District of Wisconsin had the largest jump in filings, up 36.1 percent. The District for the Northern Mariana Islands had a 56.5 percent drop in filings. The largest drop among mainland districts was the 18.6 percent decrease in the Western District of North Carolina. The Eastern District of California led the increase in terminations, up 69.2 percent, while the Western District of Wisconsin fared worst, with 23.8 percent fewer terminations.
- Criminal cases filed in the district courts were up 6.9 percent. Terminations rose 7.7 percent. ■

PERSONNEL

Nominations

Frank H. Easterbrook, U.S. Circuit Judge, 7th Cir., Feb. 25

James F. Holderman, Jr., U.S. District Judge, N.D. Ill., Feb. 25

Thomas J. Aquilino, Jr., Judge, U.S. Court of International Trade, Feb. 25

Melvin T. Brunetti, U.S. Circuit Judge, 9th Cir., Feb. 26

Howell Cobb, U.S. District Judge, E.D. Tex., Feb. 26

R. Allan Edgar, U.S. District Judge, E.D. Tenn., Feb. 26

Edith H. Jones, U.S. Circuit Judge, 5th Cir., Feb. 27

George La Plata, U.S. District Judge, E.D. Mich., Feb. 27

Ronald E. Meredith, U.S. District Judge, W.D. Ky., Feb. 27

Alice M. Batchelder, U.S. District Judge, N.D. Ill., Feb. 28

Joseph H. Rodriguez, U.S. District Judge, D.N.J., Feb. 28

Herman J. Weber, U.S. District Judge, S.D. Ohio, Feb. 28

Carol Los Mansmann, U.S. Circuit Judge, 3d Cir., Mar. 7

Carolyn R. Dimmick, U.S. District Judge, W.D. Wash., Mar. 7

J. Thomas Green, U.S. District Judge, D. Utah, Mar. 7

Ann C. Williams, U.S. District Judge, N.D. Ill., Mar. 13

Elevation

Donald E. O'Brien, Chief Judge, N.D. Iowa, Feb. 9

Senior Status

Woodrow Wilson Jones, U.S. District Judge, W.D.N.C., Feb. 1

Edward J. McManus, U.S. District Judge, N.D. Iowa, Feb. 9

Bruce M. Van Sickle, U.S. District Judge, D.N.D., Feb. 28

Death

Frank A. Hooper, U.S. District Judge, N.D. Ga., Feb. 11

United States and Italy Cooperate on Crime

New methods of cooperation between the United States and Italy to combat organized crime and narcotics dealings were announced recently by former attorney general William French Smith. The agreements followed a two-day meeting of the Italian-American Working Group on Organized Crime and Narcotics Trafficking in Rome last January. The two nations' joint efforts include a plan to provide each other with more access to their computerized crime data and plans to make extradition between the two nations easier.

LAY, from page 7

mantled, with the exception of maintaining isolation for those people who are violent. I have talked to many wardens. I have visited many state prisons across the country. It's amazing how many wardens agree with me that only about 6 to 8 percent of the people now in prison really need to be locked up. These are the violent prisoners. These are the people who use weapons to commit crimes and put other people's lives in jeopardy. But we can take the vast majority of prisoners and put them in community treatment centers with some kind of industrial training and let them learn vocations and provide them with responsibilities and a renewed self-respect. There will always be an understanding that if there is a violation or an attempt to escape they will have to go into a prison. This is a civilized approach. What we do today is so self-defeating. I think every time I go through a prison I wonder how we can ever persuade the public of this tremendous waste of money and personal resources. I think some day changes will be made, but as long as legislatures react to public hysteria, politics will probably prevent it. We'll continue to do what we're doing now—building bigger prisons and placing more people in them. This doesn't rehabilitate anyone. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Interest in Activities of State-Federal Judicial Councils Increases

Recent reports from several state-federal judicial councils, whose formation is strongly supported by Chief Justice Burger, show that interest in the councils continues to grow.

The agendas for council meetings vary, depending on the needs of the jurisdictions, but educational programs are increasingly being held in conjunction with the meetings. These programs help create better understanding between state and federal judges, especially in the areas of habeas corpus cases and postconviction relief. They have been supported by the Federal Judicial Center through arrangements with an authority on these subjects.

The following are recent actions taken by various councils:

• In January, Alabama state appellate and trial judges met jointly with every federal judge and magistrate from Alabama. Eleventh Circuit Chief Judge John C. Godbold, commenting on the meeting, said: "Twenty years ago, many state and federal judges were sharing hostilities; today they are sharing ideas and learning from each other. We are lighting a lot of candles rather than cursing the darkness. We are pursuing the ends of justice, which is what our jobs are all about."

"Our joint discussions of habeas corpus and other issues have pointed out that federal and state judges not only share common problems," said Alabama Supreme Court Chief Justice C.C. Torbert, Jr., "but we have a mutual goal—that of enforcing and upholding the United States Constitution."

• In Florida, Judge Paul H. Roney of the Eleventh Circuit addressed a group of Florida state appellate judges recently and illustrated his remarks with Center videotapes, which were later available to the judges for replays. Although many state-federal subjects were covered, the emphasis was on the collegiality aspects of a multijudge appellate court.

• State-federal judicial council meetings in Georgia, North Carolina, and Louisiana were especially concerned with habeas corpus proceedings. In Louisiana, a new procedure adopted by State Court Administrator Eugene Murret periodically brings to the attention of state judges the names and dispositions of all cases filed in federal court. Because capital cases have been of particular concern in Louisiana, judges there are made aware of how few of these cases are actually granted review in the federal courts.

• Texas Chief Justice John L. Hill, with some suggestions for agenda items from Chief Judge William Sessions of the U.S. District Court in San

See COUNCILS, page 2

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William E. Foley

Retiring Administrative Office Director Reflects On His 40 Years of Government Service

William E. Foley, the director of the Administrative Office for more than eight years, announced his retirement earlier this year. His legal career began after his graduation from Harvard Law School in 1935. He also holds undergraduate, master's, and doctoral degrees from Harvard.

In an interview with The Third Branch *conducted after he announced his retirement, Mr. Foley spoke about his 20 years at the AO and 20 years in other government service—as federal prosecutor and with the Navy during World War II.*

You've had a distinguished career in government service spanning a period of over four decades in two branches of the government—executive and judicial. Let's start with your Navy career. You were in the Office of Naval Intelligence?

Yes, I was; first in Washington and then in the Eleventh Naval District in San Diego. In the summer of 1944 I was transferred to the Office of the Naval Attache in London and assigned to a special unit, which was assigned to become the staff of the Commander of U.S. forces in Germany when occupation of Germany was to begin. I served as deputy chief

William E. Foley

of staff for Intelligence when we moved to Germany in the summer of 1945 and was discharged in the spring of 1946, at which time I received the commendation with ribbon from the commander of the U.S. naval forces in Europe. I went out with the rank of lieutenant commander and remained active in the Naval Reserve until I retired with the rank of captain in the 1960s.

In addition, I ran a sort of training school for the Command in Ger-

See FOLEY, page 4

Inside . . .

Prisoner Employment Projects Pushed p.3

Historical Societies' Activities Increase p.3

Joint-Calendar Study Published p.7

NOTEWORTHY

New grants: The National Institute for Dispute Resolution has awarded 16 more grants to law schools to help finance courses in alternative dispute resolution.

Grants to graduate business, planning, public administration, and public policy programs are expected later this year. The institute has, in recent years, made 34 grants to law schools to foster education about alternatives to litigation.

* * *

New law: The Southern District of New York's district executive and the court's Criminal Justice Act Panel are cosponsoring a minicourse about the Comprehensive Crime Control Act of 1984. The five-session course is being offered Tuesday evenings at 5:45 p.m. at the Court of International Trade, 1 Federal Plaza, New York City. The first session was held April 23 and featured a Center-produced videotape about the new legislation, first shown via a nationwide satellite hookup in January. The course is open to attorneys interested in applying for membership on the Criminal Justice Act Panel.

* * *

New manual: A draft of the second edition of the *Manual for Complex Litigation* has been circulated for review to attorneys and the judiciary by the manual's board of editors.

See NOTEWORTHY, page 3

THE THIRD BRANCH
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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Joseph F. Spaniol, Jr., Acting Director, Administrative Office, U.S. Courts.

COUNCILS, from page 1

Antonio, is weighing the creation of a federal-state council. Replying enthusiastically to the idea, state District Judge Joe E. Kelly said, "It can only improve a judge's ability in handling some simple daily duties which often develop on the problems. The subjects . . . are current although some had their genesis with King John."

• After a hiatus of 10 years, the New York state-federal judicial council has been reactivated, partly because of interest in new approaches to old problems. More than a year ago, state and federal judges held an unprecedented gathering at Pace University in New York City, highlighted by vigorous discussions on mutual problems. The emphasis was on habeas corpus procedures, certification of state law issues, and calendar conflicts. To their surprise, the participants found—through reports based on a study made by two council members (one state and one federal)—that conflict problems are rare. The New York council has taken the position that a procedural rule should be adopted by the U.S. Court of Appeals for the Second Circuit if a certification procedure is established. Chief Judge Jack B. Weinstein, of the Eastern District of New York, at one time suggested that this would be helpful in instances such as those encountered in the Agent Orange cases, where a state statute-of-limitations question was "potentially determinative of as many as 10,000 cases." ■

THE SOURCE

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American Civil Liberties Union. "The Rights of Crime Victims." 1985.

Anderson, John R., and Paul L. Woodward. "Victim and Witness Assistance: New State Laws and the System's Responses." 68 *Judicature* 221 (1984).

"Dedication to Justice Harry A. Blackmun on the Occassion of His Twenty-Fifth Year as a Federal Judge." Authors include Richard S. Arnold, Floyd R. Gibson, and Donald P. Lay. 8 *Hamline Law Review* 1 (1985).

Eastern District of Pennsylvania, Continuing Legal Education Committee. "Government Litigation: A Seminar on Litigation Against the Federal, State and Local Governments in the United States District Court for the Eastern District of Pennsylvania." 1985.

Kaufman, Irving R. "To Keep Lawyers from Going Wrong." *New York Times*, Mar. 26, 1985, p. A27.

McGowan, Carl, Louis H. Pollak, John Minor Wisdom, and others. "In Honor of Henry J. Friendly, Jr." 133 *University of Pennsylvania Law Review* 1 (1984).

Nelson, Dorothy W. "Alternative Dispute Resolution: A Supermart for Law Reform." 14 *New Mexico Law Review* 1 (1984).

✓Newman, Jon O. "Rethinking Fairness: Perspectives on the Litigation Process" (The Cardozo Lecture). 40 *Record of the Association of the Bar of the City of New York* 12 (1985). (Also available on loan in audiotape from the Center's Media Library. Request AG-0051.)

Roberts, Samuel J. "The Adequate and Independent State Ground: Some Practical Considerations." 17 *Institute of Judicial Administration Report* 1 (Winter 1985).

Schwarzer, William W. "Sanctions Under the New Federal Rule 11—A Closer Look." 104 F.R.D. 181 (1985).

Supreme Court Historical Society. *1984 Annual Report.*

Center Established To Help Promote Inmate Employment

George Washington University has formed a National Center for Innovation in Corrections to promote efforts to employ prison inmates in meaningful jobs.

The center's formation is one of several steps taken since George Washington and the Brookings Institution sponsored a conference on prisoner employment last year. Chief Justice Burger, who is a major proponent of employment as a means of rehabilitation and as a tool to provide job skills inmates can use upon release, addressed the conference.

The steps taken to promote prisoner employment since then include:

- Appointment of Dr. Judith Schloegel to head the National Center for Innovation in Corrections.
- Recommendation of 111 steps that can be taken by corporate executives, union leaders, prison administrators, and public officials to foster productive employment by prison inmates—a concept known as "factories with fences."

The recommendations came from 39 people appointed to a national task force on prison industries, which met at the Wingspread Center in Racine, Wis., last September.

The task force is chaired by Frank Considine, president of National Can Corp. Its honorary chairman is the Chief Justice.

Quote Without Comment

"[T]he main complaint against the dual ıry was its novelty. . . . [and] 'the risk of ıjecting uncertainty and confusion into ıe proceedings'. . . . That the dual jury rocess increases these risks is beyond spute. We do not believe, however, that ıe spectre of such risks should deter ourts from implementing innovative source-saving procedures in carefully lected cases so long as these procedures e administered carefully and meet the quirements of due process."

United States v. Lewis
(D.C. Cir. 1983)

E.D. Pa. Historical Society Holds First Session; Eighth, Ninth Circuits Forming Similar Groups

The first annual meeting of the Eastern District of Pennsylvania's Historical Society was held last month, with Chief Judge Alfred L. Luongo delivering the keynote address.

Judge Luongo described the career of Judge Francis Hopkinson, the first judge of the Philadelphia-based court, who was appointed by President Washington in 1789.

The session also featured excerpts of a videotaped oral history interview with Senior Judge Albert B. Maris of the Third Circuit. The society, which was formed a year ago, has been recording the history of the court as described by judges who have served in it. Its goals are to promote public awareness of the court and to explain its functions and history to the public.

The Eighth Circuit, at the suggestion of Chief Judge Donald P. Lay, is also in the process of forming a historical society to gather information about and promote interest in the history of the circuit and each of its 10 districts.

Discussion of the proposed historical society began last year at the meeting of the Eighth Circuit Federal Advisory Committee. Similar efforts in other jurisdictions, notably in the Northern District of California and in the Second Circuit, are being used as models; the society is to be incorporated on a nonprofit basis. Plans call for the appointment of a 22-member board, including one judge and one lawyer from each district and two from the circuit at large.

The society is considering several projects, including the gathering of materials for exhibits in the courthouses in St. Paul and St. Louis, where the Eighth Circuit sits; research into the history of the judges, lawyers, and decisions of the circuit and each of its districts; and, if time and funds permit, the publication of some of the results of its research.

Members of the board of directors representing the circuit at large will be Judge Richard S. Arnold of Little Rock and Robert C. Tucker of St. Louis, who was clerk of the court of appeals for the Eighth Circuit for many years.

The Ninth Circuit is drawing up articles of incorporation for a circuit historical society. The Northern District of California's historical society is already functioning, and the District of Oregon and the Central District of California are well along in the planning stage.

The Seventh Circuit reports no plans for a historical society, but it is taping oral histories from its judges, beginning with the senior judges. ■

NOTEWORTHY, from page 2

New commission: ABA President John C. Shepherd has announced the formation of a special commission with "a broad mandate to study issues affecting the professional performance of lawyers." The commission will take an objective look at the criticisms that have been leveled against lawyers and jurists in a number of areas and attempt "to determine what validity there is in these allegations."

Issues to be studied are lawyer advertising, cost of litigation to litigants and the courts, lawyer competence, commercialization of legal services, availability of legal services to low- and middle-income persons, and professional ethics and discipline. The commission will both identify problems and recommend solutions.

* * *

Old inmates: The Justice Department's Bureau of Justice Statistics has issued a report on a recidivism study that states that "almost 84 percent of the people entering state prisons during the period studied were repeat offenders."

FOLEY, from page 1

many. In the beginning I was about the only German-speaking officer in the group. In addition, we ran a training school in the Reserve work that we did here in Washington after the war.

How many languages do you speak?

I speak some French, but not fluently. I've studied Spanish, but German is the only language I can claim any fluency in.

Did your career continue in the Department of Justice after the termination of World War II or did it start then?

Actually it started just before I went into the Navy in 1940, which is the year I finished my graduate work. I went from the Department of Justice into the Navy, and then came back to the Department of Justice in 1946.

Can you tell us anything about the cases you handled in the Criminal Division?

Well, the first cases I handled were on assignment from the Criminal Division to the Southern District of New York, and they were exclusively war frauds cases. None is of any great note today, but it was very good experience for me. They afforded me good trial and appellate experience, even though we were unsuccessful in the major cases we tried.

Was it common practice at that time to try to cheat on defense contracts?

I can't really say that. It's hard to generalize.

How about the Judith Coplan case, in which you were involved?

Well, that was a very unpleasant experience. She had been, to the best of my knowledge, a trusted employee. It is very disconcerting to find that you are actually dealing with somebody who is handing things over to the potential enemy. And, having to testify, as I did in both trials in Washington and New York, was not a very happy experience.

The other cases I handled at that time were largely appearing before grand juries in matters relating to violations of the Foreign Agents Registration Act. The only one I recall offhand involved the Amtorg Trading Corporation.

Then in 1950, I believe it was, the chief of the Internal Security and Foreign Agents Registration Section, Raymond Whearty, became the deputy assistant attorney general of the Criminal Division, and I succeeded him as chief of Internal Security and Foreign Agents Registration. In 1954 Internal Security became a division of itself, and I became executive assistant to the assistant attorney general. In 1957 I was called back to the Criminal Division as first assistant. That title is now deputy assistant attorney general. I served in that capacity until I came into the Administrative Office in 1964.

> **"It has always been my ambition to try not to say 'no' if there's any way I can find to meet the wishes of the judges."**

One thing I might add about my Criminal Division experience. In 1953, when President Eisenhower came in, he reestablished or at least added new life to the National Security Council and used it very heavily. He had a very interesting head of the council or director, Robert Cutler, who ran the Planning Board of the council, and I was designated as the attorney general's representative on the Planning Board of the National Security Council, and that was for about three years. It was some of the most interesting work I've done.

Your stint in the Administrative Office came next in 1964, when you became deputy director. The personnel in the Administrative Office was much smaller then.

Indeed it was. We had 177 people on the staff of the Administrative Office in 1964. In the middle of the year 1984, we had 533, and today we have approximately 600.

It is the biggest court system in the world?

I believe that's true. In 1964, in the entire federal court system, we had 6,383 people. That includes judges, law clerks, court clerks, criers, and so forth. In mid-1984 that number grew to 16,677.

In 1964 there were 378 judgeships in the federal court system, whereas today there are 168 judgeships for the courts of appeals and 576 district court judgeships. Counting senior judges who remain active, there are around 1,000 active judges in the federal court system. How has this growth affected the work of the Administrative Office?

The impact on the Administrative Office hit us in almost every branch of our work. There was impact on the Personnel Division, which keeps the records. There was heavy impact on our buildings and furnishings units, for example, when the large number of additional judgeships was added in the 1970s. We had anticipated the legislation, and our buildings unit had surveyed the potential impact on all the courts of the country for which new judgeships were being recommended. As a result we were as ready as we could be for the new judges when they were authorized and then appointed.

For many years you were secretary of the Judicial Conference of the United States. How does the Conference function today to develop policy? Do you feel that it is functioning as effectively as it can through committees, committee reports, and two meetings a year?

Well, the Conference is functioning today pretty much along the same lines as it did when I joined the Conference in early 1965. You must understand that the Conference operates through the committee system just as the Congress does, and the committees meet periodically throughout the year, at least once

before each meeting of the Conference. Some committees hold special meetings, or they operate through subcommittees, which meet at intervals between the meetings.

How many serve on the Executive Committee?

The Executive Committee of the Conference has six members, appointed by the Chief Justice to act for the Conference in matters that need to be taken care of between the regular meetings of the Conference. The Conference also meets especially at the call of the Chief Justice. For example, when the Criminal Justice Act was passed the Chief Justice created a committee that studied the needs of the judiciary to implement the act, and then the Conference was called into special session in January of 1965 and took action to implement the work of the special conference committee. That, incidentally, was the first meeting I attended as secretary of the Conference, Jan. 8, 1965.

Did you get called on much in your capacity as secretary of the Conference?

Occasionally, not frequently.

How do you react to the request for sunshine in government and especially requests by the press for open meetings of the Conference?

I think the Conference, if it held open meetings, would be a lot less successful. The two Chief Justices I have served under were strong believers that the real work of the

"We can't do for all the judges what we would like to do. . . . You can't live beyond your budget."

conference—the open exchange of views among the members—would be inhibited by open meetings. They might not speak as frankly on matters that affect personnel of the courts and problem areas that inevitably arise. That free, open exchange is something that both the Chief Justices I have served were great believers in.

When you became director of the AO in 1977, you became the fifth individual to fill that position. Did you make any big changes that you felt were necessary to your administration?

Basically the organization of the

"We had 177 people on the staff of the Administrative Office in 1964. . . . Today we have approximately 600."

Administrative Office remains the same, but some changes had to take place to meet the requirements of new legislation. For example, as deputy director I used to handle a good deal of the criminal justice work myself. Once federal public defenders were authorized, however, it became more than I could handle alone, and we set up a Criminal Justice Act Division. That is when I brought in James Macklin as head of that division. And since I've been director, he has been my executive assistant.

As director of the AO, dealing with around 1,000 federal judges, you received many requests for more personnel, more courtrooms, more books, more equipment. Obviously there are times when you must say "no." How do you cope with these turndowns and the objections to the turndowns?

Well, traditionally and humorously an administrator is known as the person who says "no." It has always been my ambition to try not to say "no" if there's any way I can find to meet the wishes of the judges. Obviously, the greatest limiting factor is funds—the budget—and particularly with expensive equipment such as much of the current automated equipment is. We can't do for all the judges what we would like to do. And this has caused many hard feelings, which I regret very much, but it just seems inevitable that you can't live beyond your budget.

Can you think of any instance, even if it is ancient history, in which you had to disagree with a judge on administrative matters that really led to some sort of confrontation?

Not seriously so; we've had some unfortunate turndowns. For example, a judge may have his heart set on furnishing his chambers in a certain way, which goes beyond the guidelines under which we operate and which have been approved by the Judicial Conference for what we may spend on office furniture. Many times new judges have not had an opportunity to familiarize themselves with the work of the Judicial Conference and what the Judicial Conference means to the Administrative Office. But you must remember that section 604 of title 28 says the director of the Administrative Office shall operate under the policy guidance of the Judicial Conference of the United States. Those are pretty positive words.

Did the Financial Disclosure Act give you any problems, especially when some of the judges failed to comply with filing requirements?

It did not give the Administrative Office as such any problems. The administration of that act was vested in the Judicial Ethics Committee of the Judicial Conference, which has been chaired since its inception by Judge Edward Tamm, and whether Judge Tamm has had any problems, I cannot say.

What is the total budget for the judicial branch for fiscal year 1985?

The adjusted appropriation for fiscal year 1985 is $1,121,680,000. This does not include the U.S. Supreme Court.

How much are you asking for in fiscal year 1986 to cover all the needs, including personnel, for the biggest court system in the world?

We are asking for approximately

See FOLEY, page 6

FOLEY, from page 5
$1,121,449,000; again, this does not include the Supreme Court.

That represents less than 1 percent of the federal budget, doesn't it?

Less than one-tenth of 1 percent.

All right. And your office prepares the request to Congress for funds, which makes it possible for the federal courts to operate. A couple of times in recent history the AO's budget was not yet fully approved before the start of the next fiscal year. This obviously presented some problems. How did you respond to them?

In each instance there was a continuing joint resolution in the Congress permitting us to operate as we had under the prior budget. Now the budget process is for the Administrative Office to prepare the budget and then consult with the Budget Committee of the Judicial Conference before submitting a final budget, which we do by transmittal to the Office of Management and Budget on Oct. 15 each year. You remember, too, that the budget cycle is a long one. We submit it on Oct. 15 for the fiscal year commencing the following Oct. 1.

It's difficult to anticipate?

It's very difficult to anticipate, especially if you have new buildings going up, or new legislation, although if new legislation comes through that requires a substantial addition to the budget, we may go to the Congress to ask for a supplemental appropriation.

You have a good relationship, I understand, with people in Congress.

Well, we try to keep the committees fully advised through their staff on what we're doing and what we hope to achieve in the future.

What are some of your greatest problems today?

Well, one difficult situation is the fact that our headquarters office here in Washington is separated into five different buildings. One of these buildings, which houses our printing plant and mailroom, is even outside the District of Columbia. It does not make for good administration to have your staff separated.

Another problem is related to the demands of automation. Automation is very costly and yet very few judges appointed in recent years find our automation in any way comparable to what they were accustomed to in the private practice. They have become accustomed to certain types of automation and expensive equipment, which sometimes we cannot give them, mainly because of the cost.

Parking is another difficult situation, not only for the judges but the staffs. Courthouses built 50 to 75 years ago were often built in an excellent part of the city that over the years has deteriorated. Often these areas are not safe for judges and their staff.

Is security a big problem?

The U.S. Marshals Service is handling security insofar as funds for personnel permit. Security generally has become a much more important subject in recent years, however, and at present, with all the drug-related offenses, we have very serious problems. We have had threats against federal judges. Sometimes, the judges involved in incidents, and who are the subjects of serious threats, don't think we are doing an adequate job, but we are doing the best we can with what we have. Whenever a threat against a federal judge occurs, we send someone there immediately, as does the U.S. Marshals Service. They send a special individual there who is knowledgeable in planning and so forth.

Some of the judges complain that they get splendid cooperation from the AO but then when the implementation starts through the regional offices of GSA, they run into problems. Is one of the problems at GSA that it is just so big it is impossible to function effectively?

Yes. You cannot treat a courthouse as you would an ordinary public office building utilized by those in the executive branch. You have to have courtroom space, you have to have security provisions to handle prisoners as well as judges and their personal staffs. I'm not sure GSA is always attuned to the needs of the courts.

We have a special building staff here, and it is ready at the drop of a hat to travel to try to meet the requirements and wishes of judges. And by and large I would say judges' requests are usually reasonable.

What would you like to see accomplished for the federal courts in the immediate future and well beyond—the millennium for the federal court system?

That's a hard one to answer. But I would hope that we would become better able to handle the requests of the judges. It all gets back to money. I would hope that the day is not too far away, for example, when the Administrative Office and the Federal Judicial Center would be together in one building. Also, it would probably save the government some money in the sense that we wouldn't need as many conference rooms as we do with separated and multiple housing.

What do you look forward to doing in retirement that you haven't had time to do before because of the demands of your position?

Well, for one thing, reading is something I enjoy very much and I have had very little extra energy to do this at night, especially when we've been in crisis situations. The theater is another. My wife and I both enjoy the theater. And even on vacations there hasn't been much free time. Last summer I spent two weeks in New Hampshire, and the minimum number of calls from the office each day was six. You're really never away from it. It follows you.

And you will have more time to spend with your children. How many are in the Washington area now?

Only three right now.

Any of them lawyers?

Two, and a third coming up. My daughter Ann and son Chris are lawyers, and my son Richard is still in law school. ■

PERSONNEL

Nominations

Walter K. Stapleton, U.S. Circuit Judge, 3d Cir., Mar. 27
Kenneth F. Ripple, U.S. Circuit Judge, 7th Cir., Apr. 1
Mark L. Wolf, U.S. District Judge, D. Mass., Mar. 8
William G. Young, U.S. District Judge, D. Mass., Mar. 8
Charles C. Lovell, U.S. District Judge, D. Mont., Mar. 27

Confirmations

Melvin T. Brunetti, U.S. Circuit Judge, 9th Cir., Apr. 3
Frank H. Easterbrook, U.S. Circuit Judge, 7th Cir., Apr. 3
Edith H. Jones, U.S. Circuit Judge, 5th Cir., Apr. 3
Carol Los Mansmann, U.S. Circuit Judge, 3d Cir., Apr. 3
Walter K. Stapleton, U.S. Circuit Judge, 3d Cir., Apr. 3
Thomas J. Aquilino, Jr., Judge, U.S. Court of International Trade, Apr. 3
Alice M. Batchelder, U.S. District Judge, N.D. Ill., Apr. 3
Howell Cobb, U.S. District Judge, E.D. Tex., Apr. 3
Carolyn R. Dimmick, U.S. District Judge, D. Wash., Apr. 3
J. Thomas Green, U.S. District Judge, D. Utah, Apr. 3
James F. Holderman, Jr., U.S. District Judge, N.D. Ill., Apr. 3
George La Plata, U.S. District Judge, E.D. Mich., Apr. 3
Charles C. Lovell, U.S. District Judge, D. Mont., Apr. 3
Ronald E. Meredith, U.S. District Judge, W.D. Ky., Apr. 3
Herman J. Weber, U.S. District Judge, S.D. Ohio, Apr. 3
Ann C. Williams, U.S. District Judge, N.D. Ill., Apr. 3
Mark L. Wolf, U.S. District Judge, D. Mass., Apr. 3
William G. Young, U.S. District Judge, D. Mass., Apr. 3

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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Administrative Office of the United States Court

Federal Judicial Center
A. Leo Levin, Director
Charles W. Nihan, Deputy Director

Center Publication Evaluates Use of Joint Calendar

The Center has published *The Joint Trial Calendars in the Western District of Missouri*, by Donna Stienstra of the Center's Research Division. Part of *Innovations in the Courts: A Series on Court Administration*, the report describes a calendaring system under which some noncomplex cases are periodically placed on a joint calendar after the assigned judges have prepared them for trial. Those cases are then tried by the first available judge.

Adopted 15 years ago in an attempt to guarantee firm trial dates for certain cases, the joint trial calendar system helps clear the court's dockets at regular intervals.

The report outlines the history and operation of this procedure, reviews its impact on judges, court personnel, attorneys, and the caseload, and offers guidelines for other courts weighing its adoption. Copies of the court's forms and documents are included in the appendixes.

Copies of this report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope). ■

Positions Available

Circuit Executive, U.S. Court of Appeals for the District of Columbia Circuit. Salary up to $68,700, depending on qualifications. See 28 U.S.C. §332(e) and (f) for special qualifications and general functions. Required are undergraduate degree and extensive successful executive experience requiring application of full range of management principles and techniques. Degree in law or graduate degree in management/administration highly desirable. Position available Aug. 1. Send application by May 15 to Judge Abner J. Mikva, U.S. Court of Appeals, U.S. Courthouse, Washington, DC 20001.

• • •

Chief Staff Counsel, U.S. Court of Appeals for the District of Columbia Circuit. Salary up to $67,940. Requires law degree, bar membership, and a minimum of five years of progressively responsible experience in the practice of law or legal administration. Substantial litigation experience is preferred. Send application by May 15 to Judge Patricia M. Wald, U.S. Court of Appeals, U.S. Courthouse, Washington, DC 20001.

• • •

U.S. Magistrate, U.S. District Court for the Western District of Missouri (Jefferson City). Salary $68,400. Responsible for conducting initial appearances in criminal cases, various pretrial matters, and evidentiary proceedings; and the trial and disposition of misdemeanor cases and of civil cases upon consent of litigants. Requires membership in the bar of the Missouri Supreme Court and at least five years' law practice. Applicants must be younger than 70 years old and not be related to a judge of the Western or Eastern Districts of Missouri. For an application form, write R.J. Connor, Clerk, U.S. District Court, Room 201, 811 Grand Ave., Kansas City, MO 64106. The deadline for applications is June 28.

• • •

District Executive, U.S. District Court for the Central District of California. Salary $59,233 to $68,700, depending on experience. Requirements include a college degree and management experience. A degree in business or public administration or in law is desirable. Resumes and cover letters should be submitted by May 17 to Judge Laughlin E. Waters, U.S. District Court, 312 North Spring St., Los Angeles, CA 90012.

• • •

Chief Deputy Clerk, U.S. District Court for the Eastern District of Texas. Salary from $37,599 to $52,262, depending on qualifications. Responsible for assisting the clerk of the court and managing the court's clerical and administrative operations. Send application by June 3 to Murray L. Harris, Clerk, U.S. District Court, 211 W. Ferguson St., Room 309, Tyler, TX 75702.

EQUAL OPPORTUNITY EMPLOYERS

CALENDAR

May 6–8 Civil Case Management Workshop

May 7–10 Video Orientation Seminar for Newly Appointed Magistrates

May 12–14 Seventh Circuit Judicial Conference

May 12–15 Eleventh Circuit Judicial Conference

May 14–18 Sixth Circuit Judicial Conference

May 15–17 Workshop for Newly Appointed Training Coordinators

May 16–21 Seminar for Senior Staff Attorneys

May 17 Federal Circuit Judicial Conference

May 19–21 D.C. Circuit Judicial Conference

May 19–22 Fifth Circuit Judicial Conference

May 20–22 Workshop for Fiscal Clerks of Circuit, District, and Bankruptcy Courts

May 28–31 Ninth Circuit Judicial Conference

May 29–31 Judicial Conference Subcommittee on Judicial Improvements

June 3–5 Workshop for Appellate Court Case Management

June 4–5 Judicial Conference Advisory Committee on Civil Rules

June 5–7 Pretrial Service Officer Training

June 6–7 Judicial Conference Subcommittee on Supporting Personnel

June 6–7 Judicial Conference Advisory Committee on Criminal Rules

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Chief Judge Cummings Praises Oral Argument, Urges More Active Judicial Conference Role

Walter J. Cummings, chief judge of the Seventh Circuit, has served on that court since 1966. He is a graduate of Yale University and Harvard Law School and began his legal career as a member of the solicitor general's staff in 1940. In 1944, he became special assistant to the attorney general. In 1946, he returned to his native Chicago and joined the firm that is now Sidley and Austin, leaving for two years to serve as solicitor general from 1952 to 1953.

Chief Judge Cummings serves on the Judicial Conference and was chairman of its former Committee on Records Disposition. In this Third Branch *interview, he discusses, among other topics, the size of the Seventh Circuit, the use of en banc decisions, and the usefulness of oral argument, and offers a plan in which active circuit judges would temporarily sit with courts in other circuits.*

Chief Judge Walter J. Cummings

Geographically, your circuit is relatively compact, encompassing three average-sized states. Does this have any impact on your court, either good or bad?

The compactness of the Seventh Circuit helps the court of appeals and attorneys who practice in it, for Chicago is the center of transportation for this circuit as well as fairly close to the geographical center of the circuit. All three states—Illinois, Indiana, and Wisconsin—have a mix of agriculture and industry as well as metropolitan and rural areas. The relative similarity of the states in the circuit fosters the collegial atmosphere shared by all members of the court of appeals. The

See CUMMINGS, page 4

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Cheng Tianxiang, president of the Supreme People's Court of the People's Republic of China, visited the FJC last month with three other judges from China. Details on p. 3.

ABA Panel Recommends Higher Judicial Salaries

Salaries for Article III federal judges should be increased, an American Bar Association commission has recommended. The suggestion came from the ABA's Federal Judicial Compensation Commission.

Under the commission's pay formula, district judges would receive $99,600 a year and circuit court judges $105,600, a 31 percent increase; and associate justices $134,900 and the Chief Justice $140,800, a 34 percent increase.

The ABA's recommendations were presented to the federal Commission on Executive, Legislative, and Judicial Salaries in April. ■

New Legislation Allows Senior Judges to Serve On Sentencing Panel

President Reagan has signed legislation allowing the appointment of senior judges to the U.S. Sentencing Commission.

The legislation is an amendment to the Comprehensive Crime Control Act of 1984, which created the commission and provided that three active federal judges would be among its seven members. The act made no provision for replacing judges who left their courts to serve on the commission, so Congress added a provision allowing senior judges to serve on the panel.

Under provisions of the original legislation, which remain in effect, the Judicial Conference submits the names of at least six judges to the president, who nominates three to serve. The Conference submitted its list after the new legislation was signed, and included senior judges on its list.

The amended legislation also authorized the Administrative Office to request appropriation of initial funds for the commission, since the commission, not yet in existence, could not make a request on its own. The AO requested $2,350,000.

The sentencing commission's main task will be to set a narrow range of sentences for given crimes. Judges who depart from those sentences will have to explain why, and appeals of sentences above or below the guidelines' ranges will be allowed. ■

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Inside...

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Chief Judge Clark Opposes Proposed Budget Cut..... p. 3

Three-Day Conference on Court Automation Focuses on New AIMS System

More than 20 representatives of the courts of appeals joined Administrative Office and Center staff as guests of the Fourth Circuit for a three-day meeting in Richmond this spring to discuss the status and future of the Center's New Appellate Information Management System (New AIMS).

New AIMS is an electronic docketing and case management reporting system that helps courts in calendaring, panel formation, statistical reporting, and other administrative tasks. The Fourth, Ninth, and Tenth Circuits have served as pilot courts for the system and are nearing the completion of testing its functions.

Sixth Circuit Clerk of Court John Hehman, chairman of the group that met in Richmond in late April, said, "New AIMS defines a frontier in appellate-court automation and is a model for other electronic docketing systems. Center staff are now completing work on the first set of goals they and this users' group established a little more than two years ago.

"We are meeting in Richmond to determine what remains to be done, and how responsibility for those tasks will be shared among the Center, the Administrative Office, and the courts."

Mr. Hehman emphasized the roles and responsibilities of court staffs in the success of the automated system. "In the past, responsibility for automated systems was transferred from the Center to the Administrative Office. Now, in an important sense, much responsibility also transfers to the courts themselves. We welcome that responsibility."

One of the session's highlights was a demonstration of New AIMS by Robert Hoecker, chief deputy clerk of the Tenth Circuit and a key contributor to the specification of the system's capabilities. "New AIMS can be as simple or as complex as each court requires," Mr. Hoecker said. "It will revolutionize how we manage the courts' business." ■

Report Examines Presentence Observation Practice

The Center recently published *Observation and Study in the Federal District Courts*, an assessment of the current process for the observation and study of convicts before they are sentenced. The assessment, written by Julie Horney, is based on interviews with judges, probation officers, and Bureau of Prisons staff members.

Under this statutory procedure, a judge may refer a convicted offender to the Bureau of Prisons for a 90-day period of observation and study before imposing sentence. The report focuses on the referral process in the courts and the preparation of the required reports in the correctional institutions, and examines the extent to which the reports are meeting the courts' needs.

The report also comments on the extent to which the process meets the recommendations of a 1977 Center study on the same topic and offers several recommendations for further improvement. In addition, the assessment notes sections of the Comprehensive Crime Control Act of 1984 that will modify the observation and study process.

Copies of the report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed label, preferably franked. ■

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Joseph F. Spaniol, Jr., Acting Director, Administrative Office, U.S. Courts

Open Season for Life Insurance Changes

There is a 30-day open season for changing life insurance benefits until July 1.

All employees of the federal court system can increase or decrease the amount of term insurance they acquire through payroll deductions or purchase insurance for the first time. The Administrative Office has sent out information kits, titled "FEGLI 1985," to all employees.

PERSONNEL

Nominations

John P. Moore, U.S. Circuit Judge, D.C. Cir., Apr. 5

Stanley Sporkin, U.S. District Judge, D.D.C., Apr. 5

George F. Gunn, Jr., U.S. District Judge, E.D. Mo., Apr. 17

Sam B. Hall, Jr., U.S. District Judge, E.D. Tex., Apr. 17

J. Frederick Motz, U.S. District Judge, D. Md., Apr. 23

Confirmation

R. Allan Edgar, U.S. District Judge, E.D. Tenn., Apr. 15

Appointments

Melvin T. Brunetti, U.S. Circuit Judge, 9th Cir., Apr. 5

Frank H. Easterbrook, U.S. Circuit Judge, 7th Cir., Apr. 10

Elevation

Harold D. Vietor, Chief Judge, S.D. Iowa, May 1

Resignation

Robert M. Duncan, U.S. District Judge, W.D. Pa., Apr. 1

Senior Status

Barron P. McCune, U.S. District Judge, W.D. Pa., Apr. 1

Joe Eaton, U.S. District Judge, S.D. Fla., Apr. 2

Chief Judge Clark Urges Reconsideration of Proposed Budget Cut

Reconsideration of a proposed reduction in the federal judiciary's budget for fiscal year 1986 was urged last month by Chief Judge Charles Clark, chairman of the Judicial Conference's Committee on the Budget.

Chief Judge Clark, in a letter to Sen. Pete V. Domenici (R-N.M.), chairman of the Senate Budget Committee, noted that the appropriations subcommittee had advised that a proposed budget resolution would cut the 1986 funding request by nearly 10 percent. "In light of the need to reduce deficit spending," Chief Judge Clark said, "we have already reduced our 1986 request by $4,435,000 and have since conceded an additional $12,150,000. We are now at the bare minimum. The proposed arbitrary reduction will severely impair the ability of the courts to accomplish the mission set for them by Congress."

Chief Judge Clark noted that the entire judicial branch budget is less than one-tenth of 1 percent of all government spending. Among the reasons he cited for not reducing judicial appropriations further are that the judiciary must handle vast increases in litigation over which the courts have no control, since "courts must accept all cases filed which are within the jurisdiction set by Congress," and there are 85 newly created judgeships that require judicial and staff salaries and office space. "The judiciary is essentially a service organization," Chief Judge Clark added. "We cannot discontinue, postpone, or curtail programs or activities. The Criminal Justice Act requires that representation be furnished to defendants in criminal cases. Their numbers are increasing. This expense is uncontrollable. Jury costs resulting from increased civil and criminal filings cannot be stopped. Administrative and clerical needs caused by these increases must be met." ■

Chief Justice Burger Addresses Publishers

The Chief Justice, speaking to the American Newspaper Publishers Association Convention:

> Assume a newspaper in 1953 with a circulation of 146,300; 65 pages of news and editorials; and a senior staff of nine. By 1969, 16 years later, the circulation is 420,200, the paper now has 88 pages of news and editorials, and still has a senior staff of nine. Another 14 years later, that is 1983, the circulation is now 510,000, the news and editorial columns run 151 pages a week, but the senior staff remains at nine.

The Chief Justice converted the hypothetical newspaper figures into 1,463 cases on the docket of the Supreme Court and 65 signed opinions in 1953 as opposed to 5,100 cases and 151 opinions in 1983—and nine justices then and now.

This quoted statement was made in the context of the Chief Justice's further discussion of the workload of the Supreme Court—this time to publishers—urging creation of an intercircuit panel to deal with circuit conflicts, thus relieving the Court of many of the cases it must now decide.

Four judges and four court administrators from the People's Republic of China visited the Federal Judicial Center last month while on a tour of the United States sponsored by the U.S. Information Agency. Listening to a presentation about the federal judiciary at the Center are, left to right, Tang Guangli, president of the High People's Court of Guangdong Province, and Zheng Tianxiang and Ren Jianxin, president and vice president, respectively, of the nationwide Supreme People's Court. President Zheng's rank is equivalent to that of vice premier. They also visited the Supreme Court, where the Chief Justice hosted a dinner and reception in their honor.

New Book Lists Crime Victims' Expanded Rights

A new book published in anticipation of the availability of up to $70 million in funds to compensate crime victims details the assistance to which such victims are entitled.

The book, *The Rights of Crime Victims,* was written for the American Civil Liberties Union by two New York lawyers, James Stark and Howard Goldstein.

Its publication precedes implementation of a crime victims' fund created by Congress as part of the Comprehensive Crime Control Act of 1984.

See VICTIMS, page 7

Federal Rules Sent to Congress

The Chief Justice, on behalf of the Supreme Court, sent to Congress amendments to the federal rules of civil, criminal, and bankruptcy procedure on April 29.

All of the amendments were approved by the Judicial Conference of the United States at its September 1984 meeting and then sent to the Supreme Court for consideration.

If Congress takes no action, the rules become effective Aug. 1.

CUMMINGS, from page 1

compactness means that the judges and attorneys from different parts of the circuit see each other more frequently, which makes for a friendlier atmosphere in the courts.

With the recent death of Chief District Judge J. Waldo Ackerman, there was a great need for judges to try cases in Springfield, Ill. Judges throughout the circuit were tremendous in their willingness to help. I doubt that the response would have been as great if this had been a larger circuit and the volunteering judges had not known Judge Ackerman as well as they did, or if they had to travel great distances to hold court.

Two of the states in your circuit, Indiana and Illinois, are in the so-called "rust bowl"—declining industrial states with severe and persistent unemployment. Does this area's economics affect the court or its caseload in any way?

The term "rust bowl" is really a misnomer. Although it is true that heavy industry has greatly declined throughout the circuit and the railroads have been greatly reduced, new industries are replacing them. The economics of the states in the circuit greatly affect the court's caseload. For example, the decline of heavy industry has reduced large air pollution litigation while also increasing bankruptcy filings. Any change in the economic infrastructure affects the type and number of case filings.

> **"En bancs should be used only sparingly.... Too many cooks spoil the broth."**

The Seventh Circuit showed a 2.8 percent decline in cases filed in the last statistical year. Can you attribute this to any one factor?

I know of no one factor that resulted in the decline in filed cases in the court of appeals last year. I would like to hope that it was the result of attorneys taking a more realistic look at the merits of the issues before filing the appeals. Over the last several years, the courts in this circuit have been much more willing to award attorneys' fees when a complaint or appeal is frivolous. This may be a factor in the reduction of appeals. The decline may also reflect business taking a closer look at the rising cost of litigation. You may be interested to know that the decline of filings has continued. One possibility is the recognition by lawyers that our district judges' fine reputations make reversals less likely.

> **"The decline of filings has continued. One possibility is the recognition by lawyers that our district judges' fine reputations make reversals less likely."**

Have you reduced the caseload of new case filings through any special management techniques?

No, there is nothing special. There are procedures for expediting appeals, but the goal of this is not to dissuade appellants, but to minimize procedural problems and eliminate appeals in which there is no appellate jurisdiction. Preargument sessions with lawyers sometimes produce settlements.

Does your court have a preargument settlement procedure?

The court does have docketing conferences with attorneys, as has been reported in a Federal Judicial Center publication. However, the purpose of those conferences does not include forcing settlement. It is an opportunity to ask the attorneys if they have discussed settlement and if settling is possible. The court has not taken an active role in dissuading appellants from taking their appeals.

Docketing conferences were initiated by then-chief judge Luther M. Swygert, who brought many innovations to the court during his tenure. Now Senior Staff Attorney Ramsay L. Klaff conducts them as they are needed. They occur mostly by request, although Mrs. Klaff suggests them infrequently.

Your court currently has 11 authorized judgeships, and three senior judges continue to serve. Is this enough judge power?

The court currently has only eight active judges and three senior judges. When our three vacancies are filled, our complement should be sufficient to handle the caseload at its present level. I have been concerned for a number of years that increases in the number of law clerks and staff attorneys and in unpublished orders may be viewed as diminishing the judges' input into the decision-making process. Although we need to be concerned about efficient management practices, there must not be an undue delegation of judicial authority and shortcutting of justice.

Some appellate courts are leaning more and more toward the issuance of relatively brief unpublished opinions. Does the Seventh do this?

Although the court of appeals decides cases by unpublished orders, the court does not decide appeals without giving its reasons. The court of appeals has stated that it does not approve of trial judges deciding cases without giving reasons, so it would be inconsistent for the court not to give its reasons. Some of our unpublished orders may be longer than they need to be, since a lengthy recitation of the facts is not necessary and will only be read by the parties. I have discussed this concern with my colleagues. Nevertheless, in order not to proliferate the Federal Reporter [Second], we will continue to use orders when no new principles or conflicts with other circuits are involved.

Some courts use en bancs very sparingly. How do you feel about en banc hearings?

I agree that en bancs should be used only sparingly. The Seventh Circuit

hears about three or four cases a year en banc. The ensuing opinion is difficult for the writing judge because it engenders so many suggestions by the majority judges, requiring many changes before the draft opinion receives approval. In truth, too many cooks spoil the broth.

Has the Seventh Circuit cut back on the time allowed for oral argument, as a timesaving device?

When I came to the court of appeals in 1966, 45 minutes for oral argument was allotted to each side of an appeal. The court then started limiting the oral argument time to a range varying from 10 to 45 minutes per side. Limiting oral argument time is useful since it saves judicial time and does not interfere with the decision making in the case. When judges have questions or want to hear additional oral argument, the panel will allow more than the allotted time to the parties. Although it is easy to give attorneys additional time during oral argument, it is hard to tell them not to use all the time allotted.

How useful is oral argument in deciding a case?

While the majority of cases could be decided without oral argument, it is difficult to determine which cases really need argument for decision. Although oral argument may not be necessary, it is usually helpful in deciding the case. Frequently, the judges have questions about areas of law unanswered by the briefs. Oral argument gives the judges an opportunity to obtain answers to their specific questions. It also allows counsel to hone particular and important points. The Seventh Circuit has been a strong believer in oral argument, and that tradition will continue.

It is important to remember that oral argument is not only helpful in deciding the case, but it is also an element of the appeal that counsel and parties have come to expect. Oral argument demonstrates to counsel that the judges have read the briefs and are familiar with the case. It insures that parties know their appeal is being decided by well-prepared judges and not by staff. It can determine the outcome in close cases.

Being chief judge of a large metropolitan circuit court of necessity calls for a lot of administrative work. Do you handle this administrative work and also carry a heavy caseload?

I carry the same caseload as all the other active judges. This was also true for my predecessors. We have been able to do that by delegating much of the administrative work to the staff and by the chief judge's willingness to devote more time to his entire workload.

How often does your circuit Judicial Council meet?

The Judicial Council meets about three times a year. However, throughout the year there are many issues that are decided by polling the council via the mail.

As some other circuits have done, the Seventh Circuit and the district courts encompassed in the circuit have adopted local rules for death-penalty cases. What new procedures are now in effect and why were they necessary?

The Seventh Circuit Judicial Council is developing rules for handling habeas corpus cases involving the death penalty in the district courts, as well as appeals in the court of appeals. The procedures will only apply to the states of Illinois and Indiana, for Wisconsin has no death penalty. The rules are being designed to set forth specific procedures so that the cases may be expeditiously decided on the merits. The rules will ensure that all parties are notified and receive copies of all pleadings and that there are no situations in which the courts are unable to act because they do not have the proper information.

"The courts in this circuit have been much more willing to award attorneys' fees when a complaint or appeal is frivolous."

You may be interested to know that I wrote to the chief justices of the Illinois and Indiana supreme courts and asked them if they would consider setting executions during the week as opposed to on a weekend or on Monday in order to minimize weekend communication problems of notifying judges and attorneys. This idea originated with the committee that has been drafting the rules for processing habeas corpus cases involving a person under a sentence of death. The proposal was supported by government attorneys as well as by attorneys who generally represent persons under a sentence of death. Chief Justice Howard Ryan of the Illinois Supreme Court has written to me that Illinois will not set execution dates on Monday so that there will not be a last-minute scramble by attorneys trying to file pleadings over the weekend. I am looking forward to a similar response from Indiana.

Do you have a special jury utilization plan in the Seventh?

The Seventh Circuit has no special jury utilization plan. The members of the Judicial Council do closely review the jury utilization statistics and recently asked one of our districts to work to bring down its percentage of jurors who did not serve and were not challenged. Two chief district judges who are members of the council volunteered to go to that district and talk to the judges about the procedures they had utilized in making effective utilization of potential jurors. The district has not reduced its voir dire panels and is considering other policies, such as pooling of jurors among judges to use them more efficiently and with less intrusion on their time.

Did your experience as solicitor general materially help prepare you for your work in the circuit court?

After graduating from law school, my first few years were spent in the U.S. Solicitor General's Office as a young assistant handling cases in the courts of appeals and later in the

See CUMMINGS, page 6

CALENDAR

June 3–5 Workshop for Appellate Court Case Management

June 4–5 Judicial Conference Advisory Committee on Civil Rules

June 5–7 Pretrial Services Officer Training

June 6–7 Judicial Conference Subcommittee on Supporting Personnel

June 6–7 Judicial Conference Advisory Committee on Criminal Rules

June 9–14 Special Summer Program for Judges

June 10–11 Judicial Conference Standing Committee on Rules of Practice and Procedure

June 13–14 Judicial Conference Committee on the Judicial Branch

June 17–18 Judicial Conference Subcommittee on Judicial Statistics

June 17–18 Judicial Conference Subcommittee on Federal Jurisdiction

June 17–18 Judicial Conference Subcommittee on Federal–State Relations

June 17–19 Workshop for Juror Utilization and Management

June 19–21 Judicial Conference Committee on Administration of the Bankruptcy System

June 19–21 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits

June 20–21 Judicial Conference Ad Hoc Committee on Inns of Court

June 24–26 Judicial Conference Committee to Implement the Criminal Justice Act

June 24–26 Workshop for Fiscal Clerks of Circuit, District, and Bankruptcy Courts

June 27–29 Fourth Circuit Judicial Conference

July 1–2 Judicial Conference Committee on Administration of the Magistrates System

July 1–2 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice

July 1–3 Judicial Conference Committee on Judicial Ethics

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THE THIRD BRANCH

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THE THIRD BRANCH

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Supreme Court Names Spaniol as Clerk, Margeton as Librarian

Stephen G. Margeton, chief librarian at one of Washington's largest law firms, has been named librarian of the Supreme Court.

Mr. Margeton will replace Roger Jacobs, who left to become librarian at the University of Notre Dame Law School.

Mr. Margeton, 40, is the chief librarian at Steptoe & Johnson, where he has been for 5 years. He previously served as an assistant reference librarian in the law reading room of the Library of Congress. Chief Justice Warren Burger described Mr. Margeton as "well respected by librarians and lawyers alike," and said that "the Court is fortunate to be gaining his leadership and experience."

Stephen G. Margeton

Mr. Margeton was selected by the Court after a national search. His experience in meeting the research needs of time-pressed lawyers is expected to help him provide assistance to the Justices. He is moving to what he called "a library that's been very well run," and

See MARGETON, page 2

Joseph F. Spaniol, Jr., deputy director of the Administrative Office for the last seven years, has been appointed clerk of the Supreme Court. He will replace Alexander Stevas, who will retire July 31.

Chief Justice Warren E. Burger, who announced the selection on behalf of the Court, said, "I am convinced that Joe Spaniol has the experience, training, and personal qualities to do an outstanding job" as the Court's clerk. "We are delighted he is joining us at the Court."

Joseph F. Spaniol, Jr.

The clerk is one of the Supreme Court's four statutory officers and one of its most prestigious staff members.

"Although service in the Administrative Office has been very rewarding," Mr. Spaniol said, "I look forward to this new challenge and to the opportunity to continue to work within the Federal Judiciary." He will assume his new position on Aug. 1.

The Chief Justice noted that Mr. Spaniol "has had a long and fruitful career with the Administrative Office," a career that began in 1951. Among the positions Mr.

See SPANIOL, page 2

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LIBRARY

ureau of Prisons Director Carlson Discusses Crime, Sentencing, Punishment

Norman Carlson has been director of the reau of Prisons for 15 years. Born in Iowa, graduated from Gustavus Adolphus Col- in Minnesota in 1955 and received a ster's degree from the State University of a in 1957. He began his career in penol- as a parole officer at Leavenworth, Kan., 957 and held a series of positions at the eau of Prisons in Washington, including years as executive assistant to former ctor James Bennett, from 1960 until his pointment as director in 1970. In a wide- ging Third Branch *interview, Mr. lson discusses expansion of the federal pri- system, judicial interest in prison condi- s, theories of punishment, employment nd bars, and determinate sentencing.*

There has been great growth in son populations—in both state federal institutions. What has caused this, other than an increase in the general population?

The federal prison population has expanded by 40 percent, from 24,000 to over 34,000 during the past five years. There are several factors involved, the first being the increased resources in the federal criminal justice system—additional FBI and DEA agents, more U.S. attorneys, and of course an increase in the number of U.S. district court judges. The capacity of the system has increased, and we, at the end of the system, are experiencing the results of that expansion. Another factor is a shift in public attitude about what should be done to those who commit crimes. Public sentiment has changed in recent years, and I think that has been reflected in sentencing policy as well as by the U.S. Parole Commission.

How many institutions do you have in the federal prison system now, and what plans, if any, do you have for expansion?

We have expanded, and we now have 45 institutions. We have added 2,000 new beds to our capacity during the past year. The newest institution was opened May 17 in Phoenix, Ariz. We are aware of the demands placed on us and are attempting to be responsive.

Can you give more detail about your plans for dealing with the problems of overcrowding?

We are actually involved in what I

See CARLSON, page 4

SPANIOL, from page 1

Spaniol has held at the AO were Administrative Attorney (the predecessor to the General Counsel's post); Chief of the Division of Procedural Studies and Statistics; and Assistant Director for Legal Affairs. He was named by the Supreme Court to be Deputy Director of the Administrative Office in 1977 and has been Acting Director since William E. Foley retired as director earlier this year.

Mr. Spaniol, 59, has had extensive involvement with the activities of the Judicial Conference of the United States. During his tenure as AO deputy director, he also served as secretary to the Judicial Conference and is currently secretary to eight of the conference's committees. Mr. Spaniol has attended every Judicial Conference session for the past 28 years, and serves as the liaison between the Judicial Conference and the public, briefing reporters on actions taken at the Conference's twice-a-year meetings.

Mr. Spaniol has also played a role in many innovations in the federal court system, including the first seminars for newly appointed district judges and the establishment of the federal magistrates system.

He holds a law degree from Case Western Reserve University and an LL.M. degree from Georgetown University, and has completed the Harvard University Senior Managers in Government program.

Mr. Spaniol and his wife, Viola, have eight children. ■

Chief Judge Walter T. McGovern, l., (W.D. Wash.), chairman of the Court Administration Committee's Subcommittee on Supporting Personnel, held a meeting of the subcommittee at the Federal Judicial Center recently. With him in the Dolley Madison House during the discussions are, l. to r., Judge Daniel H. Huyett 3rd (E.D. Pa.); Judge Thomas G. Gee (5th Cir.); and R. Glenn Johnson, chief of the Personnel Division of the Administrative Office.

MARGETON, from page 1

will assume his new post on July 15.

Mr. Margeton is experienced in library automation, as well as research, and has held several posts in the American Association of Law Libraries. He has taught legal research at George Mason University School of Law.

At the Library of Congress, Mr. Margeton worked in the law reading room, responding to requests from members of Congress, employees of federal agencies, and the public. He also worked in the Library of Congress's office in the Capitol, and was involved in researching legislative histories at the library. At Steptoe & Johnson, he supervised formation of a unit whose sole responsibility is to track legislative histories. Drawing a contrast between an academic library such as the Library of Congress and a private-sector library, Mr. Margeton said he expected the Supreme Court's library to be "more like academia,but the seriousness and cutting-edge legal nature of the [Justices'] requests will be more like the pressure of a private firm."

He noted that he will probably be torn by a dilemma facing most of those in his profession: "Ideally, all law librarians like to straddle the fence between manager and researcher. I hope I can do both."

Mr. Margeton is a graduate of the National Law Center of George Washington University and holds a master of library science degree from Catholic University of America.

He is married to Margaret Salter Margeton, who is also a librarian. They have two children. ■

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Joseph F. Spaniol, Jr., Acting Director, Administrative Office, U.S. Courts

Judicial Panel, Practitioners Exchange Views On Settlement at Federal Circuit Conference

Judges and attorneys exchanged views on frivolous appeals, unjustified delays in litigation, and settlement methods at the Court of Appeals for the Federal Circuit's recent annual judicial conference.

Practitioners presented statements on those subjects, and Chief Judge Howard T. Markey of the Federal Circuit, Chief Judge Edward D. Re of the U.S. Court of International Trade, and Chief Judge Alex Kozinski of the U.S. Claims Court commented on their remarks. The three judges then answered questions.

More than 1,400 people, including Chief Justice Warren E. Burger, the circuit justice for the Federal Circuit, attended the May 17 conference.

Rep. Henry J. Hyde (R-Ill.) addressed the conference's luncheon session. ■

Insurance Policies for Resigned, Retired, and Senior Judges Explained

Many judges have recently raised questions about the extent of their life insurance coverage under the Federal Employees' Group Life Insurance program, known as FEGLI, when they retire from office or take senior status.

The following series of questions and answers provides details about this insurance. The answers are based upon both the statutory provisions governing FEGLI (chapter 87 of title 5, U.S. Code) and the regulations of the Office of Personnel Management, as interpreted by the Administrative Office's Office of the General Counsel.

Q. Are recent complaints that judges will lose their FEGLI coverage when they retire true?

A. No. If they retire from regular active judicial service to senior status under 28 U.S.C. §§ 371(b) or 372(a), such judges continue to be fully covered for life, as long as they continue in that status.

Q. If a judge takes senior status, is there a minimum of judicial activity he or she must undertake to retain full insurance coverage?

A. No. By statute, a judge who meets the age and length-of-service qualifications for retirement can take senior status and thereafter perform such judicial duties as he is willing and able to undertake." He or she continues to draw the judicial salary. Thus, a judge who opts to take senior status, but no longer hears cases, retains the judicial office and the right to continue full insurance coverage, even though he or she is totally inactive. Such a judge still holds a judicial commission, however, and therefore remains bound by the Code of Judicial Conduct and the statutory prohibition against practicing law.

Q. What happens to the insurance coverage of judges who resign?

A. New statutory language, adopted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, eliminates the word "resign" from the relevant U.S. Code provisions. Under the recently amended provisions of 28 U.S.C. § 371(a), a judge who leaves the bench age 65, having attained an age and years of service totaling 80, can opt to "retire from [judicial] office" rather than take senior status. That is the equivalent of a resignation on salary under the old language. A judge who opts for such a resignation/retirement receives an annuity that, by statute, is equivalent to the judicial salary at the time of leaving the bench. That amount is frozen and does not rise with future judicial pay increases. The retiree is legally free to practice law. According to OPM, life insurance coverage begins to shrink when a judge chooses this type of retirement. This is the same approach that previously applied to judges who resigned on salary under the old language of § 371(a).

Q. Who decided optional coverage should begin to terminate at retirement for judges who don't take senior status?

A. The Office of Personnel Management, over vigorous objection from the Administrative Office.

Q. Can OPM do this?

A. OPM is authorized by statute to prescribe regulations for federal life insurance programs. OPM ruled that notwithstanding an amendment to the definitional section of the FEGLI statute made by last year's bankruptcy legislation, the new category of retired judges—those who resign on a fixed annuity—are no longer active employees and are thus ineligible for full, continuing FEGLI participation. When OPM made its regulatory interpretation known, the Administrative Office sharply disagreed and requested a ruling that, based upon the new statutory language, would treat judges who retired from office the same for insurance purposes as those who retired from active service to senior status. OPM remained firm in its views, however, and two judges who retired under 28 U.S.C. § 371(a) have now filed suits contesting OPM's position. Both suits are pending at this time, and are on expedited schedules for the briefing of cross-motions for summary judgment.

Q. How many people are affected by OPM's interpretation?

A. According to the AO, only two judges eligible for retirement have elected to retire from office since the enactment of the Bankruptcy Amendments and Federal Judgeship Act. These are the plaintiffs in the two lawsuits.

Q. How does insurance coverage for retired judges shrink?

A. In the same manner as for other retired federal employees. Retired judges can opt to keep 25, 50, or 100 percent of their basic insurance for as long as they want. One hundred percent of basic insurance coverage is equal to approximately a year's salary. If only 25 percent of basic insurance is retained, it continues without cost to the judge. If 50 or 100 percent of this coverage is kept, the judge does have to pay, and the premium rates are higher than during the judge's active

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CARLSON, from page 1

call a multifaceted approach to the problem of overcrowding. We are not concentrating solely on building new institutions. There is simply no way we could build fast enough or obtain enough money from the Congress to solve the problem through construction. We are trying to approach the problem on a systematic basis. First, as I have indicated, we are building several new institutions such as the one recently opened in Phoenix. We are beginning a new high-rise metropolitan detention center in Los Angeles. Other institutions are in the planning process—in the northeast, in the southeast, and in the northwest.

We are also adding housing units wherever existing institutions can accommodate additional living space for inmates.

Thirdly, we are attempting to acquire surplus facilities. We opened a new camp on a former Air Force base in Duluth, Minn., last summer. The bureau purchased the former state mental hospital in Rochester, Minn., and a closed seminary in Loretto, Pa., all of which have been converted into correctional institutions.

Finally, we have expanded the number of inmates who are transferred to community treatment centers at the end of their sentences. On any given day, we have 3,000 inmates who are in a halfway house rather than in prison. If we didn't have them in halfway houses, we'd have 3,000 more inmates to worry about.

You are good enough to come down and give your time to talk to the new district judges. Do they have special questions that they want to ask of you then, or when they visit the prisons?

Yes, they do. I believe it is very important that we have a dialogue with the judges because we are responsible for carrying out the orders of the courts. I think judges should know as much as possible about the federal prison system—our strengths as well as our limitations.

"I believe it is very important that we have a dialogue with the judges."

Do many of the judges come back to revisit?

There are a number of federal judges who want to know where we send the individuals they commit to custody. Some judges have visited every federal institution in their region because they want to know more about what happens once they impose sentence. It's great that a judge has that much interest in the system—that he or she would take time from an obviously very busy schedule to find out firsthand what does happen to a defendant once sentence is imposed.

Do judges ask about specific prisoners?

Some judges want to talk to prisoners they sentenced in order to get their reaction. I think that's a very laudable step on the part of the federal judiciary.

The structure of the sentencing institutes has been changed over the years. What happens to cause changes in how judges, especially district judges, are oriented to sentencing and to their relationship to the bureau?

I think the changes have been a distinct improvement. There is more discussion now by the judges themselves and less lecture from experts. I believe there is a good balance today in the programs. I recall when I first attended a sentencing institute in Highland Park, Ill., when Jim Bennett was director of the Bureau of Prisons. At that time the program was virtually all lecture. The new format that has been developed by the Federal Judicial Center over the past several years involves a mix of both lecture and discussion groups.

Privately run prisons have been built in some areas. At least one of your institutions is under contract with one of these private contractors, isn't it?

We have a small youth facility for inmates in San Francisco that is operated under contract by a private firm. Thus far, we have been generally pleased with the program. I am not necessarily opposed to privatization of prisons, but believe there are a number of questions and concerns that need to be carefully examined. Further research is clearly needed in this area.

Some in correctional work oppose privatization of institutions though?

The control and liability issues are of concern. Also the question is raised concerning the government abdicating its responsibility when it turns over the important criminal justice sanction to the private sector. My guess is that private firms will probably never run maximum-security institutions. On the other hand, they have done well in running halfway houses, community programs, and specialized institutions. I think the idea deserves careful analysis, and that's what we in the Bureau of Prisons are planning to do.

And is security one of your main concerns?

Yes, it is. That is why I have questions concerning the private sector running secure institutions. They do a good job in community-based programs and probably minimum-security institutions.

"The idea [of abolishing parole] is truth in sentencing."

Penologists and sociologists have differing views on jailing convicted offenders, but generally have in mind retribution, general deterrence, rehabilitation, or incapacitation. Each of these has been in vogue at different times, and each requires varying approaches to penology. Does the federal prison system follow a fixed

policy or theory? How much has this changed over the years?

We in the Bureau of Prisons have discarded the notion that we have the ability to rehabilitate inmates. Twenty years ago we thought that if we had sufficient resources we could somehow change inmates' behavior while they were in prison. Experience and research in this country and throughout the world clearly indicate that's impossible. We can, however, provide opportunities for inmates to change. That is an important difference. While people are incarcerated we have the responsibility to provide them with opportunities in education, vocational training, work, religious activities, etc., so that those who are motivated can use their time constructively.

The correctional institution at Butner, N.C., continues with the Morris model of incarceration, with fixed release dates, special programs building up to release, and, sometimes, assignment to a halfway house, supervised by one familiar with the prisoner's background. Has this plan shown a record of success sufficient to bring about an expansion and acceptance of Norval Morris's concepts of prison reform?

We adopted the ideas suggested by Prof. Norval Morris of the University of Chicago Law School in his book *The Future of Imprisonment.*

The research program at Butner was devoted to the long-term recidivistic, assaultive disorders. It has a difficult population.

Butner is one of our newer institutions. The institution was opened in

"We have discarded the notion that we have the ability to rehabilitate inmates."

1976 and has served as a model for prison construction throughout the country. The program has a psychiatric component where we have inmates who are sent for study and observation. The other component is a research program that attempts to find new and better ways of dealing with the problems of prison management.

When a new administration comes in, do you have to adjust to its policy and theory?

No, I can say that I've been director for over 15 years, and the bureau has never changed philosophy or policy because of a change in administration. I believe that our policies and philosophies are in tune with the thinking of most Americans.

Norman Carlson

How well has the concept of giving all or most federal inmates a job within the prison—the Chief Justice's concept of "factories with fences"—worked?

I totally endorse the Chief Justice's advocacy. One of the important things the Chief Justice has done is to serve as an advocate for correctional reform and improvement. There are very few leaders concerned with the need to improve our nation's prisons and jails. Politicians generally don't because there are no votes in this area, or it costs too much money. When a man with the stature of the Chief Justice speaks out on the subject, people listen. It's been a great help to us, with the Congress and others in the budgetary process.

Have you expanded Federal Prison Industries' services recently?

As you know, Federal Prison Industries is a totally self-sustaining corporation that sells goods and services to federal agencies, including the federal courts. We do much of the printing for the federal courts because of the Chief Justice's personal interest and support. We employ nearly 10,000 inmates, on a 40-hour-a-week basis, working in Federal Prison Industries. Most important, it reduces idleness.

Have you been in contact with the National Center for Innovation in Corrections recently started at George Washington University?

Yes, we are actively involved. I went to Sweden and Denmark with the Chief Justice three years ago. That was the origin of the center at George Washington University. I think it's a most worthwhile endeavor.

Can you make arrangements with people in business to employ prisoners?

We certainly do attempt to do so. We have advisory councils that meet in our institutions and assist in developing programs. I would like to mention that Federal Prison Industries now has an IBM executive on loan to the government. It's an excellent example of how corporations can provide support and assistance.

Of all of the countries that you've visited—and you have been in many—where did you find the most exemplary prison system?

"I believe that our policies and philosophies are in tune with the thinking of most Americans."

I would have to say the Scandinavian countries that we visited—Sweden and Denmark. Their prisons are small and highly staffed. They are professionally managed and are the most humane that I have seen anywhere in the world.

Are there a lot of small institutions, or is the percentage of inmates

See CARLSON, page 6

CARLSON, from page 5

a lot lower in those countries?

There is a lower percentage of inmates because there is less crime. They certainly don't have the problems we have in our country. Both Sweden and Denmark consider 50 inmates to be a major institution. The 200 inmates we saw in one institution occupied what is considered to be an extremely large institution.

What are the recidivism rates in Scandinavian countries?

Unfortunately, their recidivism rates are high, if not higher than, we find in this country. They have not solved the problem of recidivism any better than we have.

When the Comprehensive Crime Control Act of 1984 is fully implemented, a prisoner's sentence will not be subject to parole as we now know it, and will only be able to be reduced a minimal amount by "good time." Do you feel that's a good change?

I do. I realize it is controversial, but in effect, the idea is "truth in sentencing."

One of the other goals of that legislation is to reduce the disparities among people who are serving time for the same crime. Will that ease prisoner complaints of unfair treatment?

> **"We are not building institutions like Alcatraz, Leavenworth, or Atlanta."**

Yes, I think it will serve to provide a more rational basis for imposing sentences. We now have similar inmates from one district who receive the maximum sentence for the offense and one from the next district who receives a much shorter sentence for the same offense. I think the Sentencing Commission will provide a more uniform additional basis on which sentences are determined.

Is that going to mean that the sentence will fit the crime and not the criminal?

I believe it will fit both. The legislative history is clear. The sentences are to consider the offender as well as the offense.

One more question on the crime control act: Is it making an impact yet on the federal institutions?

It has already had an impact, primarily in pretrial confinement for offenders who previously would have been released on bond or on recognizance. That has served to increase our population.

At all the institutions or primarily at Springfield, Ill.?

Springfield, and more recently Rochester, Minn. I'd like to mention Rochester because it's an institution judges will be interested in. We acquired the former state mental hospital and are now making some minor modifications to the buildings. It is a comparatively new, modern hospital less than 20 years old. The institution will have a surgical as well as a medical component and a psychiatric program. We have already recruited several top-notch psychiatrists from the Rochester area who are now working at the institution.

Do you expect that as a result of the changing approach to insanity reflected in the 1984 legislation you will house fewer people who are incompetent to stand trial?

No, I don't believe so, because we will be housing some offenders who are found to be both dangerous and incompetent to stand trial. Previously those found incompetent were turned over to state authorities for hospitalization. Because of the new statute, we will be seeing more offenders in confinement who are found to be incompetent.

Would you like to talk about the National Institute of Corrections?

I would certainly like to discuss the National Institute of Corrections. It is a program the Chief Justice is personally responsible for. As you may recall, there was a national conference on corrections in Williamsburg, Va., in 1972. During the conference, the Chief Justice made a speech in which he suggested that the federal government develop a program similar to the FBI Academy in order to assist state and local correctional officials.

From that speech, which several individuals picked up on, the National Institute of Corrections was developed. While located here in the

Norman Carlson

Bureau of Prisons, it is an autonomous organization. While the institute is small—41 full-time staff and a budget of 12 million dollars—I think it does play an important role in attempting to improve our nation's prisons and jails.

Does the institute direct its funds at one specific purpose?

Training is the primary function—training of probation as well as prison and jail personnel.

The escape of Bernard Welch from the Federal Metropolitan Correctional Center in Chicago has received national attention. What might be done to make the bureau's institutions more escape-proof?

There were a series of breakdowns. Welch was initially sent to the maximum-security penitentiary at Marion, Ill.—where he belonged. While there, he cooperated with the government by providing useful information. As a result, we were asked to

See CARLSON, page 7

CARLSON, from page 6

move him out of Marion for protection because the information he provided made him vulnerable to attack by other inmates. He was placed in the Chicago Metropolitan Correctional Center, from which he escaped.

There is no such thing as an escape-proof prison. I think that's a myth. Welch proved that certainly Chicago was not escape-proof.

To sum up, you have been in corrections work for many years. What do you view as the most progressive steps that have been taken over the past decade or so?

The professionalism of our staff. Today over half of the new correctional officers have college degrees. Staff, I think, are much better equipped to work in corrections than they were 28 years ago, when I first started. I am also proud of the staff training we provide. We now have a staff training center in Glynco, Ga., which trains all employees.

The second major improvement, I think, is the design of new institutions. We are not building institutions like Alcatraz, Leavenworth, or Atlanta. We are building institutions like Butner and Phoenix that are modern, safe, and humane. Above all, they cost far less to construct than traditional prisons. They cost less because we don't use the bars and the grilles that we have in the old penitentiaries. ■

PERSONNEL

Nominations

Alex Kozinski, U.S. Circuit Judge, 9th Cir., June 5

Robert C. Broomfield, U.S. District Judge, D. Ariz., May 15

Claude M. Hilton, U.S. District Judge, E.D. Va., May 15

Donald E. Walter, U.S. District Judge, W.D. La., May 15

Wayne E. Alley, U.S. District Judge, W.D. Okla., June 3

James D. Todd, U.S. District Judge, W.D. Tenn., June 5

Louis L. Stanton, U.S. District Judge, S.D.N.Y., June 12

Confirmations

John P. Moore, U.S. Circuit Judge, 10th Cir., May 3

Kenneth F. Ripple, U.S. Circuit Judge, 7th Cir., May 3

George F. Gunn, Jr., U.S. District Judge, E.D. Mo., May 3

Sam B. Hall, Jr., U.S. District Judge, E.D. Tex., May 3

Joseph H. Rodriguez, U.S. District Judge, D.N.J., May 3

Appointments

Carol Los Mansmann, U.S. Circuit Judge, 3rd Cir., Apr. 22

John P. Moore, U.S. Circuit Judge, 10th Cir., May 14

Thomas J. Aquilino, Jr., Judge, U.S. Court of International Trade, May 2

Alice M. Batchelder, U.S. District Judge, N.D. Ohio, Apr. 15

Carolyn R. Dimmick, U.S. District Judge, W.D. Wash., Apr. 17

R. Allan Edgar, U.S. District Judge, E.D. Tenn., Apr. 29

Herman J. Weber, U.S. District Judge, S.D. Ohio, Apr. 30

James F. Holderman, Jr., U.S. District Judge, N.D. Ill., May 1

George La Plata, U.S. District Judge, E.D. Mich., May 1

Senior Status

Thomas A. Flannery, U.S. District Judge, D.D.C., May 10

Lee P. Gagliardi, U.S. District Judge, S.D.N.Y., July 17

Deaths

Sarah T. Hughes, U.S. District Judge, N.D. Tex., Apr. 23

William G. East, U.S. District Judge, D. Or., Apr. 27

Albert G. Schatz, U.S. District Judge, D. Neb., Apr. 30

George E. Cire, U.S. District Judge, S.D. Tex., May 5

Correction

John P. Moore was incorrectly identified last month as having been nominated to the D.C. Circuit, not the 10th Circuit.

CALENDAR

July 9–12 Orientation for New Probation Officers

July 15–16 Judicial Conference Committee on the Administration of the Criminal Law

July 16-19 Orientation for New Probation Officers

July 18–19 Judicial Conference Committee on the Administration of the Probation System

July 23-26 Eighth Circuit Judicial Conference

July 29–30 Judicial Conference Committee on the Operation of the Jury System

July 30–31 Judicial Conference Committee on Court Administration

Aug. 7-9 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

Positions Available

Staff Assistant to the Circuit Executive, U.S. Court of Appeals for the Eleventh Circuit. Salary to $36,327. Serves as office manager for administration and internal supervision of circuit executive's office. Assists with budget, personnel, office space, publications, conferences, security, and court planning. Application and resume or SF-171 should be sent by July 15 to Norman Zoller, Circuit Executive, U.S. Court of Appeals, 50 Spring St., S.W., Atlanta, GA 30303-3147.

• • •

Clerk, U.S. Bankruptcy Court, District of Alaska. Salary $44,430 plus $11,107 cost-of-living allowance. Responsible for managing the administrative activities of the clerk's office, including consultation on court policies and supervision of personnel, budget, case processing, service of process, and record keeping. Requirements include 10 years' administrative experience, including 3 years of management responsibility. Law practice may be substituted for either administrative or managerial experience; college-level education may be substituted for general administrative experience, with each year counting for 9 months' experience. A degree in public, business, or judicial administration may be substituted for another year's general experience, and a law degree for 2 years' general experience. Send resume indicating position applied for to Hon. J. Douglas Williams II, Bankruptcy Judge, 701 C St., Box 47, Anchorage, AK 99513.

EQUAL OPPORTUNITY EMPLOYERS

INSURE, from page 3

service because the government's contribution to the cost of the insurance ceases. At retirement, judges begin to lose any optional FEGLI coverage they had when they were active. FEGLI's option A, which usually provides $10,000 in coverage in addition to the basic coverage, shrinks 2 percent a month after resignation until it reaches $2,500, where it stays. Option B, which provides insurance up to five times the annual salary, declines 2 percent a month and ends completely 50 months after resignation. Option C, family coverage, is reduced in the same way as option B. There is no charge for optional coverage while it is being reduced.

Q. Doesn't a life insurance policy usually build up value? What happens to that value for judges who retire?

A. Whole-life insurance builds up value. Term-life insurance, which is basically the kind offered by FEGLI, doesn't have any surrender, trade-in, or residual value. Term life costs much less than whole life for that reason. Insurance experts say that people who want to make sure they will leave something to their survivors should consider whole-life coverage. People who want to protect young children or ensure that a mortgage will be paid off, by contrast, should consider term insurance because, as they approach retirement age, their reasons for having life insurance become less urgent and they can simply let the policy lapse.

Q. Can a retiring judge convert the policy to one paid for individually, as opposed to a FEGLI group policy?

A. Yes, with some limitations, according to OPM. Employees who are separated from federal service have the option of selecting alternate coverage, up to the level of FEGLI's basic, option A, and option B coverage from a private carrier on an approved OPM list. The replacement policy isn't term insurance, though, and will almost certainly be more expensive than FEGLI's group term rates.

Q. Is it necessary to have a physical exam to get that insurance?

A. It is not.

Q. What happens to the insurance benefits of disabled judges?

A. A judge who is disabled becomes a senior judge and is entitled to the same insurance benefits as other senior judges.

Q. What happens to judges who resign before age 65?

A. Such judges come under the general rules for federal employees who resign; that is, they lose all their coverages. There is no provision permitting continuation of the basic insurance indefinitely or of the optional coverage for 50 months. A judge who resigns before 65 could, like any other resigning federal employee, convert the term policy—basic and optional—to a private policy that would be nonterm insurance at increased cost. The right to make such a conversion isn't affected by health or medical considerations. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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AUGUST 1985

L. Ralph Mecham, ARCO Executive, Named Administrative Office Head

Chief Justice Warren E. Burger greets L. Ralph Mecham, the new AO director.

L. Ralph Mecham, Washington representative for federal government relations of the Atlantic Richfield Company, and a former university and corporate vice president and Senate aide, has become the sixth director of the Administrative Office of the U.S. Courts. He was appointed by the Supreme Court on the recommendation of a search committee composed of the Chief Justice and Justices White and Rehnquist.

Mr. Mecham, 57, took office July 15, replacing William E. Foley, who retired earlier this year.

His selection was announced late in June by the Chief Justice, who said, "Ralph Mecham possesses an impressive background of accomplishment in both the private and public sectors. We are pleased to bring him into the Judicial Branch."

Chief Justice Burger noted that Mr. Mecham's "impressive and varied background and personal qualities took him to the top of the list of an outstanding group considered for the post."

Mr. Mecham earned his B.S. degree at the University of Utah and his J.D. degree at George Washington University. In addition, he holds an M.P.A. from Harvard. He was awarded a congressional fellowship to Harvard in 1963 and a graduate fellowship by Harvard in 1965.

Mr. Mecham began his Washington career as an assistant to Senator Wallace Bennett (R-Utah), for whom he worked for 13 years. He served as the senator's administrative assistant and counsel for eight of those years. He later was special assistant to the secretary of commerce for regional economic coordination, as well as cochairman of the Four Corners Regional Economic Development Commission, a presidential appointment. The Commission was a federal–state agency designed to deal with

See MECHAM, page 2

Judge Robert L. Taylor Recalls School Integration Cases, Efforts to Reduce Hugh Docket Backlog

Judge Robert L. Taylor of the Eastern District of Tennessee has been on the federal trial bench since 1949 and served as the district's chief judge from 1961 to 1969 and from 1982 to 1984.

Judge Taylor graduated from Milligan College and Vanderbilt University, earning a law degree from Yale in 1924. He was engaged in private practice in Johnson City, Tenn., until his appointment to the district court. In a wide-ranging interview, Judge Taylor recalls the problems of being the only federal judge in a large district for many years, his efforts to clear up a docket backlog of five years, his role in some historic desegregation cases, and his involvement in the trials of two former governors, Otto Kerner of Illinois and Marvin Mandel of Maryland.

You come from a very prominent Tennessee family. Your father was Governor of Tennessee, wasn't he?

My father served as governor and also as a congressman. He was a Republican. Of course his brother, Uncle Bob, was a Democrat—this state has always been Democratic, except in the last few years. And Bob beat Alf, my father, easily. Then he ran against him again. Twice they ran, brother against brother, one a Democrat and one a Republican.

Well, in that atmosphere, didn't you ever get bitten by the political bug?

No. The only thing I ever ran for was an elector. I was an elector when I voted for Truman as president.

Did you always want to be a judge?

Never thought about being a judge. I had to make a living; I had a wife and children.

Were you in private practice, Judge?

Right, private practice in Johnson City, in a little firm known as Cox, Taylor and Epps. We thought it was a busy firm not only in Johnson City but throughout the state. As general practitioners we handled anything in the United States. Our firm produced two federal judges, myself and William E. Miller, now deceased, who was appointed to the U.S. Court of Appeals for the Sixth Circuit.

See TAYLOR, page 4

UNIVERSITY OF ILLINOIS LAW LIBRARY

L. Ralph Mecham

MECHAM, from page 1

common problems faced by Utah, Arizona, New Mexico, and Colorado, which comprise one-tenth of the land area in the 48 contiguous states.

Between his service to Senator Bennett and his position at the Department of Commerce, Mr. Mecham returned to Utah for four years as vice president of the University of Utah, where, among other duties, he supervised continuing education programs and served as dean. He also taught constitutional law to political science students.

After his work on the Four Corners commission, Mr. Mecham became vice president in charge of federal government relations for The Anaconda Company. He became Washington representative for the Atlantic Richfield Company when it acquired Anaconda, and held that position until accepting the AO directorship.

Mr. Mecham was lured from the private sector to the AO, he said, because he was "looking for a new challenge—something with a sense of mission. There's a lot of good that can be done, and I want to do my part."

Mr. Mecham said that his goals as the AO's chief would be "to build on the good that's been done already—take a fresh approach to it. I'd like to continue to strengthen the reputation the AO already has—to have the AO viewed as an elite corps dedicated to the needs of the judiciary."

Mr. Mecham also stressed that he wants to establish lines of communication with all judges and that he wants them to know that he will always be available. He hopes that, in cooperation with the judges, administrative standards can be developed that are clearly understood.

Mr. Mecham commented that he is now rounding out his government career in the third branch, having already worked in Congress and in the executive branch.

Asked about his feelings about continuing education for judges, Mr. Mecham said, "I wouldn't presume to tell judges what to do, but every human being should keep the intellectual fires stoked some way."

Mr. Mecham stated that an increase in judicial salaries is among his high priorities. Having come from the private sector, he is well aware of the dramatic differences between those salaries and those of the judiciary—and the basic inequity of the latter.

Mr. Mecham and his wife, Barbara, live in the suburbs of Washington. They have five children. ■

Chief Justice Named To Bicentennial Commission

Chief Justice Warren E. Burger has been designated by President Reagan to serve as chairman of the Commission on the Bicentennial of the U.S. Constitution. Persons interested in applying for the staff directorship or other positions with the commission should send appropriate information to Dr. Bradford Wilson, Supreme Court, Washington, DC 20543. ■

Circuit Executives' Role Traced in Center Report

The First Decade of the Circuit Court Executive: An Evaluation, by John W. Macy, Jr., was published by the Center last month. Mr. Macy has served as a member of the Board of Certification since its inception in 1971.

The author reviews the functions performed by circuit executives in the various circuits and describes the extent to which the position has expanded over the past ten years. He also identifies a number of respects in which the potential of the position has yet to be realized. In addition, he offers recommendations that are relevant to extension of the concept of an executive to the larger district courts.

Mr. Macy assesses the selection process that identifies those who are eligible for appointment and offers suggestions for the future development of the role of the selecting body, the Board of Certification.

Prior to his election to the Board of Certification, Mr. Macy served as executive director of the Civil Service Commission and, afterwards, as chairman for eight years.

Copies of the report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed label, preferably franked (but do not send an envelope). ■

THE THIRD BRANCH

BULLETIN OF THE FEDERAL COURTS

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.

Programs on Inns of Court And Summary Jury Trials Available from Center

The Center has recently released two video programs, which federal court personnel can borrow from the Center's Information Services.

The American Inns of Court Program: An Introduction (VG-043), a 35-minute tape, is introduced by Chief Justice Warren E. Burger and narrated by Chief Judge Howard Markey, a member of the Judicial Conference's Ad Hoc Committee on American Inns of Court.

American Inns of Court are composed of federal and state judges, experienced litigators, law professors, and law students. They meet throughout the year and focus on improved trial advocacy and professional courtesy and ethics. Fourteen Inns have been chartered to date, and several others are being created. The first Inn was founded at the J. Reuben Clark Law School of Brigham Young University.

The video program describes the development of the Inns of Court movement in America, the role of the American Inns of Court Foundation, and the typical structure and membership of an Inn. It also presents Inn meetings, including mock trials and critiques, discussions among Inn members, and other Inn functions.

* * *

Summary Jury Trials in the Western District of Michigan (VJ-071), a 55-minute tape, was produced in cooperation with the bench and bar of that district. The program, narrated by Judge Richard A. Enslen, explains the procedure as it is used in Western Michigan and, using fictitious cases, depicts abbreviated segments of pretrial and settlement conferences as well as attorneys' summary jury presentations in three separate cases. The summary presentations—in a products-liability case, an employment discrimination case, and a breach-of-contract case—illustrate the variety of techniques available to litigators in summarizing their clients' cases to the jury.

U.S. District Judge Thomas Lambros originated the summary jury trial procedure in Cleveland five years ago, and it has since been used, with various modifications, in courts around the country. In essence, the procedure allows attorneys in civil cases that appear unlikely to settle to present a summary of the case to a six-person jury, which renders a nonbinding verdict. The procedure's objective is to provide attorneys and their clients with a realistic assessment of the verdict a jury would likely reach in an actual trial, and thus provide a basis for settlement.

At its September 1984 meeting, the Judicial Conference "endorse[d] the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases."

Further information on this technique is contained in a 1982 Center report, *Summary Jury Trials in the Northern District of Ohio*, also available from the Center's Information Services.

* * *

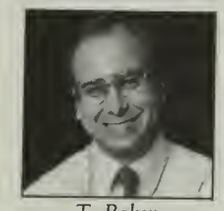
To order either or both videocassettes, write to Information Services, 1520 H St., N.W., Washington, DC 20005, noting the title and catalog number (given above). Specify either 1/2-in. VHS or 3/4-in. U-matic format and enclose a self-addressed, gummed label.

At present, the FJC is unable to distribute the video programs to persons outside the federal courts, although courts may wish to request the tapes to show at meetings of the bench and bar. ■

Selection of 1985–86 Judicial Fellows Announced

The 1985–86 Judicial Fellows are Thomas E. Baker, law professor at Texas Tech University in Lubbock, Tex.; Susan M. Olson, political science professor at the University of Minnesota in Minneapolis; and Ira P. Robbins, professor at American University's Washington College of Law in Washington, D.C.

Mr. Baker will work at the Supreme Court, while Ms. Olson and Mr. Robbins will work at the Federal Judicial Center.



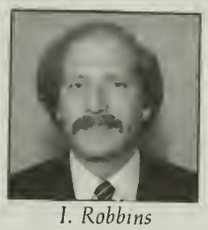
T. Baker

Mr. Baker, 31, teaches a variety of criminal, procedural, and constitutional law courses. He has taught at Texas Tech since 1979, after a two-year clerkship to Judge James C. Hill of the Fifth Circuit. He graduated from Florida State University and the University of Florida's Holland Law Center.

Ms. Olson, 35, teaches constitutional law, jurisprudence, and courses about the judicial process. She graduated from Pomona College in Claremont, Cal., and received master's and doctoral degrees from Syracuse University. Her dissertation on litigation brought by special-interest groups focused on the disability-rights movement. She has since written a book about the legal rights of disabled people and several articles for legal periodicals.

S. Olson

Mr. Robbins, 35, began his teaching career at the University of Kansas School of Law in 1975, and went to American University in 1979, where he teaches courses on criminal law subjects and on conflict of laws and choice of law. He graduated from the University of Pennsylvania and Harvard University Law School and served as the pro se clerk for the Second Circuit from 1973 to 1975. ■



I. Robbins

TAYLOR, from page 1

Did you ever aspire to be on the court of appeals?

No. I like to be on the district court, where the action is.

After private practice, did you go right to the bench?

Yes, after 25 years of private practice. I was scared to death. I first moved to Knoxville, 100 miles from Johnson City, and stayed for a while at the Andrew Johnson Hotel. I went right to work. I worked down here at night until three or four o'clock in the morning. I was the only federal judge in this part of the state until 1961, when another judgeship was created.

Did you have any orientation?

No. I just walked right in and went to work. The docket was far behind because my predecessor had been ill and he was the only federal judge in the northern part of East Tennessee. It took me five years to catch up, and I made a resolution then that I would never let the docket get behind again. There were hundreds of cases; there had been an accumulation for five years. It took me a long time to clear them, but I had the cooperation of the bar.

Some very prominent lawyers have come from Tennessee, or have traveled to Tennessee to be before your bench. Which of these people do you remember in particular?

Tennessee can be very proud of its lawyers; we had—and have—some of the finest in the country. I am thinking of attorneys like Sen. Estes Kefauver, Ray Jenkins, Graham Morison, and Sen. Howard Baker. Recently I read in the local newspaper that Howard Baker told the press that I "taught" him "how to practice law." There are so many good lawyers in this state, though, I hesitate to be more specific. I could add, however, that both John L. Lewis and Gen. William Westmoreland were the only persons appearing in my court who elected to bow as they approached the bench. Mr. Lewis was a witness for the United Mine Workers union in a suit brought by several small coal companies against the union and larger coal companies. General Westmoreland was a character witness for Judge Otto Kerner.

Do you like to try any special type of case?

Oh, I like any kind of case where you have good lawyers. With good lawyers you don't have any problems. If you have bad lawyers, regardless of what the case is, you do a bad job.

What happens when you get bad lawyers—do you try to help them?

Yes, but there is only so much a judge can do.

> **"I like any kind of case where you have good lawyers."**

Do you get impatient with them if they are not prepared?

They say I get too impatient, but if they are not prepared they shouldn't appear before the court.

What would you do?

Some lawyers would come in expecting that their cases would be passed. I would say, "Now there will be no passing." They probably said later when they left the courtroom, "He's as mean as they come." I would hold them to it, though; I'd try the cases. I finally got the docket current, and from then on I wouldn't pass a case unless there was a death in the family of a litigant or the lawyer, or if an injustice would occur.

I think I am the best friend the lawyer has. He cannot bill his client until he tries or settles the case and closes the file.

How many hours were you sitting each day?

Ten, twelve hours, sometimes at night. I also held court on Saturdays. If I had court on Friday and we weren't finished, we would continue on Saturday. We even met on some Sundays. Holidays?—we didn't know what a holiday was. It took a lot of work but I got the docket current, and it's been current ever since.

Is the docket current now?

Yes it is . With the additional judgeships, we probably have the most current docket in the country. I believe statistics will bear that out.

You've been an active judge on the U.S. District Court for the Eastern District of Tennessee for almost 36 years, and you've earned the reputation of being a good judge—good judicial temperament, fairness, good grasp of the issues before you, and good case management. What advice would you give to new district judges just coming on the federal bench?

What advice would I give them? Well, to work hard, to set the cases for trial promptly, and, after having set a case for trial, to try it on the day for which it is set, unless there is some good reason to change the date, and then decide it. Holding cases under advisement will adversely affect your health. A case should be decided promptly after it has had thorough consideration. The judges must know the law and how to apply it.

You've had considerable Judicial Conference experience. Was this valuable to you?

Yes. I got good experience and received valuable advice from the late Judge Alfred Murrah. I wouldn't take anything for that experience and for Judge Murrah's advice. When he first called me, I told him that I didn't have time for a meeting of his committee, and he said I couldn't afford not to come, that I would save time eventually. I got more out of the pretrial committee work than any other outside activity I ever participated in.

Were you at that committee meeting to learn or to try to give advice to others?

I was there to learn all I could myself, and how to use what I learned in handling cases. I had never used pretrial conferences before; after learning the value of pretrials I [felt I would not be] a good judge without holding pretrials. The judges and lawyers in Tennessee didn't know anything about pretrials. I told them once they knew how to participate in a pretrial conference, they would

appreciate its value. At first they thought I was crazy, and I am sure they said, "He ought to be examined." They learned quickly and they found out I was right.

Was it the old argument that you're just trying the case twice, and therefore they didn't want pretrial?

That's right.

Do you think the Judicial Conference functions in a good way today, through the committees?

Yes, I do.

Many members of the press have pushed for having what they call sunshine in government." They want to attend the Judicial Conference meetings. Do you believe it would do any harm to have the press attend these meetings?

No. But only if the press comply with restrictions placed upon their attendance—then let them attend. They would attend as observers, but not participants.

Would you feel comfortable with having television cameras in the courtroom?

No, I wouldn't feel comfortable. No type of TV should be allowed in the courtroom. The lawyers and witnesses would play up to TV, and there would be little things that could occur that shouldn't be picked up and broadcast in the news. It could interfere with the in-court management of lawsuits and be distracting to jurors, particularly in sensational cases.

From 1965 to 1970 you were on the Committee on Trial Practice and Technique. What was gained from this committee work?

Well, we emphasized the pretrial conferences. Some judges still do not utilize pretrials, however.

You were also on the Committee on Rules for Admission to Practice in the Federal Courts. That committee considered the possibility of getting uniformity of admission standards. Will uniformity in these rules ever come about?

Well, judges and lawyers are stubborn. They move slowly; they think their way is the best way. They just don't want to change, but I think eventually we will have uniformity.

Chief Justice Burger started the so-called Devitt Committee that studied the quality of advocacy in the federal courts. Do you think that promoting better advocacy is worthwhile?

Judge Robert L. Taylor

Yes. Judge Devitt is a fine man, and a good judge. As for the Chief Justice, I know him well; he argued a case in my court when he was a practicing lawyer. It was a case involving an Oak Ridge dispute, probably in the early fifties. He did a fine job—he is a great Chief Justice, in my opinion.

Both the Mandel and the Kerner cases were of national interest and received considerable attention; they were both emotional cases. Did you dislike going into foreign districts to try emotional and sensitive cases?

No. The Chief Justice appointed me to try the Governor Kerner case. He also appointed me to the Governor Mandel case. Both cases had to be tried. I was aware of the interest and notoriety, but while it was sometimes disruptive to the personnel in the court, we managed to handle it. The press were persistent, but cooperative.

What was the hardest part of the Mandel case?

Mandel was an intelligent man. His wife came up after he was convicted and said to me, "I want to thank you for the fair trial you have given the governor."

It must be difficult for you to see people in emotional situations like that—to see the concerned and worried families in the courtroom.

Yes, it is. When I sentenced Mandel he had members of the clergy and many other friends in the courtroom.

What were your observations of Judge Kerner?

Well, actually, when I handled his case, though we had never met, he referred to my father. It was emotionally disturbing to try a former governor and a circuit judge. He impressed me very much and appeared to be a good man. General Westmoreland testified as a character witness for him. When Judge Kerner referred to my father in his statement, I could have broken down myself; he was really doing some reminiscing. But it broke my heart.

That probably was the toughest case you ever had?

Yes, one of the toughest cases I ever tried. He was the only active judge that had ever been tried up until that time.

Isn't it kind of difficult, Judge, to sit in judgment of your peers? One judge in a like situation commented, "It's just another case."

I disagree with that.

Did you know it would be a hard case to try, emotionally and in other ways, when you got the assignment?

Yes, I did. Sure I did.

Did you try to get out of it?

No. I just took it.

Would you comment on the very first segregation case in Tennessee that you tried?

I thought somebody would have to admit me to the hospital. In the courtroom I had blacks sitting on the right side and whites on the left side. They

"Some of my best friends turned against me on account of the way I ruled in segregation cases."

See TAYLOR, page 6

TAYLOR, from page 5

selected their seats themselves. Some of my best friends turned against me on account of the way I ruled in segregation cases. They never forgave me and never will. It was terrible and very emotional.

You let the parties design their own plan?

Yes. They designed a plan for all students, regardless of race, to attend neighborhood schools. It was a good plan and has withstood the test of time. During the trial I had my telephone disconnected because I was getting calls at home. I also received many letters. I tried to act like a judge. I decided to investigate one writer and found that he was a cousin of my former law partner; he never forgave me.

Did you have concern for yourself and your family at home?

I did then.

Did you have U.S. marshal protection?

No, that service was not available to federal judges then, but I had assistance from an FBI agent who lived near me.

Didn't you worry about your family, though?

Yes, I did. It was a different day then, though. You know, I believe that might have warranted a request for security, but they really weren't into that sort of thing back in those days.

But as I remember, in the Knoxville school case, the main objection you found was the failure of the plan to permit black students to get technical training. They didn't have the same opportunities for technical training as white students did. Did they then change that?

There were three desegregation cases. In the first one, I ruled against desegregation, based on state laws and on the separate-but-equal doctrine—that was in the early fifties. Then there was the trial of a racist in Clinton, a man who beat up a Baptist minister walking children to school. Then there was the *Knoxville* case, where I refused to order busing. I am known now as "the Knoxville City School case judge." In the *Goss* case they kept coming back in to court with various interpretations, various things that had evolved. It was a grade-a-year plan and it was fairly palatable to the community. There were some interpretations that had to be defined over the years, as I recall. So that was one continuing case—it was open.

"Sentencing was always hard for me, and it got harder and harder."

Did you have any thoughts about asking an outside judge to come in?

No. I was the judge. I was not going to run away from it.

How do you feel about settlements? Before you tried a case that might take six weeks, did you call counsel in and say, "Have you people talked settlement?"

I do all I can to settle every case pending in this court. And I tell lawyers that society favors compromise, favors settlement. Now I say, "You men who are mature lawyers can settle this case better than the court can. And I want you to try. Now, if you can't, then I will try it. I'm here to try these cases and I'll try them. But I want to urge you to exercise every effort toward an amicable settlement." And I get many settlements in that way.

Some judges feel that a judge shouldn't try the case if that judge participated in the settlement process. You didn't have the luxury in the years when you were the only judge. Did that bother you—participating in the case from beginning to end, including settlement?

Not a bit.

One judge has suggested that federal judges should have some kind of sabbatical leave, so that they would have a time when they could leave their court to reflect on a given subject; to travel; or just to rest during a period of at least six months to a year. Would you approve of that?

No. I believe a judge must work. A judge should approach his tasks with a high degree of responsibility, not as an onerous, everyday chore. A district judge has a duty to the public to perform with promptness and responsibility, and must not subordinate this duty to his personal desires.

What if they feel they are just a little weary, and they want to take some time off?

Well, that's all right if they can keep up with their dockets and they can do that without hurting the public, the lawyers, or the litigants. Then, if there's time for rest, all right; otherwise, just continue to work on the bench or in chambers.

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Fourth Circuit Filings Drop Again

The number of cases filed in the Fourth Circuit declined by 3 percent during the 1983–84 statistical year, the circuit's annual report for 1984 shows. The period surveyed ran from July 1, 1983, to June 30, 1984.

The decline represents the second consecutive year in which filings dropped. In the same period, the number of appeals terminated rose 7.5 percent, after dropping 14 percent in the previous 12-month period. Pending appeals dropped in 1983–84, by 7.2 percent.

Filings in the circuit's district courts, however, rose 4.9 percent during the 1983–84 statistical year. Civil filings rose 6.6 percent, while criminal filings dropped 2.3 percent.

Bankruptcy filings in the circuit declined 15.4 percent from the previous 12-month period.

AYLOR, from page 6

Did you ever take vacations?

I'm not proud of this, but I never d a vacation in my life.

How about pay, Judge? Many dges have recently left the system cause of salary considerations. Do u feel you are well paid?

Well, I'm paid enough to live on. If I st wanted the pay I wouldn't be a dge. I'm a judge because I wanted to rve if I could and "abide by the ok" before I die. That's the reason n a judge—not for the money. I de much more practicing law. nen I came on the bench, I was king over $30,000 a year. As a fedl judge I was paid $15,000.

Did you ever put a time limit on l argument?

Yes—about 20 minutes. In opening y would make a very brief statent; but in closing arguments, I tched that closely.

Do you let the lawyers participate the voir dire process?

No. I do it all myself.

One of the criticisms of our legal tem in this country is related to plea bargaining. Do you do any plea bargaining—or do you believe in it?

No. But if a lawyer wants to do it, that's fine. I stay out of it; I don't believe that the judge should participate in it.

I understand that the judge who preceded you told you during a discussion on sentencing, "Don't worry about it; it will get easier." Did it?

No. Sentencing was always hard for me, and it got harder and harder.

What's the hardest kind of sentencing?

Well, it's not easy for me to sentence anybody. I don't care whether he's a bank robber or some small offender, it's hard for me to send him to the penitentiary. I have talked to a lot of those people who were incarcerated—people like that affect me.

Do you worry about it at night?

No. When I sentence them in the courtroom, that's it—I turn it off. No good comes from thinking about it; I don't want to think about it anymore. The late Judge George Taylor, my predecessor—no kin—taught me that. ■

PERSONNEL

Nominations

Roger J. Miner, U.S. Circuit Judge, 2nd Cir., June 25

Roger L. Wollman, U.S. Circuit Judge, 8th Cir., June 25

James M. Rosenbaum, U.S. District Judge, D. Minn., June 14

Stanley Marcus, U.S. District Judge, S.D. Fla., June 20

Thomas E. Scott, U.S. District Judge, S.D. Fla., June 20

Joseph J. Farnan, Jr., U.S. District Judge, D. Del., June 24

Edmund V. Ludwig, U.S. District Judge, E.D. Pa., June 24

Richard H. Mills, U.S. District Judge, C.D. Ill., June 25

Roger G. Strand, U.S. District Judge, D. Ariz., June 25

John M. Walker, Jr., U.S. District Judge, S.D.N.Y., June 25

Appointment

Walter K. Stapleton, U.S. Circuit Judge, 3rd Cir., May 8

Elevations

Murray M. Schwartz, Chief Judge, D. Del., May 8

Donald D. Alsop, Chief Judge, D. Minn., May 20

Resignation

Abraham D. Sofaer, U.S. District Judge, S.D.N.Y., June 9

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

Anderson, John R., and Paul L. Woodward. "Victim and Witness Assistance: New State Laws and the System's Response." 68 *Judicature* 221 (1985).

Christensen, A. Sherman. "The Next Step: A Jurisprudence of Legal Advocacy?" 1984 *Utah Law Review* 671.

Committee on Corrections. "Can Our Prisons Become 'Factories with Fences'? " 40 *Record of the Association of the Bar of the City of New York* 298 (1985).

Feinberg, Wilfred. "The Office of Chief Judge of a Federal Court of Appeals." 53 *Fordham Law Review* 369 (1984).

Gibbons, John J. "The Antitrust Jurisprudence of the Third Circuit." 40 *Record of the Association of the Bar of the*

See SOURCE, page 8

SOURCE, from page 7

City of New York 198 (1985).

Goldberg, Arthur J. "Escobedo and Miranda Revisited." 18 *Akron Law Review* 177 (1984).

Goldberg, Arthur J. "Regulation of Hostile Tender Offers: A Dissenting View and Recommended Reforms." 26 *Corporate Practice Commentator* 585 (1985).

Lambros, Thomas D. "The Judge's Role in Fostering Voluntary Settlements." 29 *Villanova Law Review* 1363 (1984).

Nejelski, Paul, "Supplements to Trial: A Court Administrator's View." 29 *Villanova Law Review* 1339 (1984).

Posner, Richard. *The Federal Courts: Crisis and Reform*. Harvard University Press, 1985.

Re, Edward D. "State of the Court: The United States Court of International Trade—Three Years Later." 58 *St. John's Law Review* 687 (1984).

Re, Edward D. "International Trade Law and the Role of the Lawyer." 26 *Corporate Practice Commentator* 487 (1985).

Van Kamp, Julie. *State Courts and Law-Related Education*. Wake Forest University, 1985.

Wald, Patricia M. "Negotiation of Environmental Disputes: A New Role for the Courts?" 10 *Columbia Journal of Environmental Law* 1 (1985).

CALENDAR

July 29–30 Judicial Conference Committee on the Operation of the Jury System

July 30–31 Judicial Conference Committee on Court Administration

Aug. 7–9 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

Aug. 19–20 Judicial Conference Advisory Committee on Codes of Conduct

Aug. 23–24 Judicial Conference Committee on the Budget

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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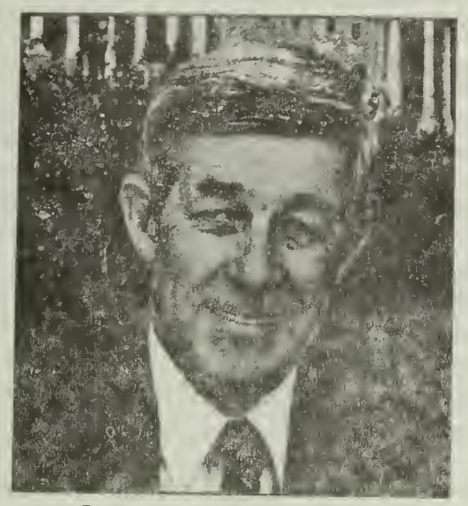
Congressman Robert A. Young

Subcommittee Chairman Favors Buying Over Leasing of Public Buildings

This month's interviewee is Congressman Robert A. Young (D-Mo.), whose work as chairman of the House Subcommittee on Public Buildings and Grounds directly affects courthouses and facilities occupied by federal judges. The decisions of this subcommittee go to the parent House Committee on Public Works and Transportation, and the subcommittee's recommendations carry great weight. In this interview, the congressman explains the review process, how the subcommittee operates, and why he was selected to serve on it.

Congressman Young, who is serving his fifth term in the House, has a reputation as a strong supporter of federal construction of office space, as opposed to long-term leases, and he frequently travels to personally inspect courthouses and their facilities.

Congressman Young began his political career on the state level by serving in both the Missouri House of Representatives and the Missouri Senate. This background, and his experience as a builder, made him a natural choice for membership on the House Public Works and Transportation Committee.



Congressman Robert A. Young

Every two years, the Judicial Conference recommends additional judgeship needs to Congress. Simultaneously, the Administrative Office of the United States Courts and the General Services Administration commence preliminary assessments of increased space needs for the requested judgeships. When an omnibus judgeship bill is reported from either congressional judiciary committee, cost estimates are prepared that include estimated expenditures for space. Would you describe the role your subcommittee plays in this process?

Once any new judges are appointed or the courts need increased space, they usually go to the General Services Administration. I think we have five regions throughout the whole country, and when those bills look like they are going to pass, then GSA has to get busy to try to find some space for the new courts. When they determine that the cost for new space exceeds $500,000, they must get a prospectus made up and submitted to our Public Buildings and Grounds Subcommittee; then, after we hold a hearing, GSA presents testimony to

See YOUNG, page 4

Seminar Scheduled for New District Judges

The next seminar for newly appointed district judges will be held from Oct. 21 to 26, Center Director A. Leo Levin and Continuing Education and Training Director Kenneth C. Crawford have announced. All seminar sessions will be held at the Center's Dolley Madison House in Washington.

The traditional reception for the new judges and their families will be held on the day preceding the opening of the seminar. The program also includes a black-tie dinner at the Supreme Court on Oct. 24.

Four Circuit Chief Judges Highlight Rising Caseloads At Appellate Conferences

Plans to deal with the staggering increase in judicial caseloads must be based on the assumption that the number of cases won't decline, at least two chief circuit judges said at separate circuit conferences recently.

"The flood of cases is not going to abate," said Chief Judge John C. Godbold of the Eleventh Circuit, after noting the steps his court had taken to increase case terminations and reduce the number of pending cases and the time it takes to decide an appeal. Courts will be forced to "seek better and more efficient ways of doing our work," he added.

Rather than recite annual statistics, Judge Godbold had a five-page summary of the court's vital statistics distributed to the audience as he spoke. It depicted the court's rising caseload in bar graphs and pie charts, as well as in statistical tables. "Do not be intimidated" by the material, Judge Godbold told his audience. "I will take you by the hand and lead you through it." He did so in fewer than 900 words.

One hurdle to increased efficiency, Judge Godbold said, is that the precedent-based system of deciding cases spills over into the management methods judges use.

We "tend to do things the way they have been done before. We live with

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Many Courts' Caseloads Rise Again ..... p. 3

Four New FJC Publications ..... p. 7

CASELOADS, from page 1

one foot in the present and one in the past."

The cure for that kind of behavior, Judge Godbold continued, is "to ask ourselves regularly: 'Why do we do this in this manner?' 'Could we do it better?' 'Do we need to do it at all?'"

One possible way to break with established practice, and thus save time, Judge Godbold said, is to write less, and do it faster.

"I want each word [I write] to be polished and to shine," he noted. "But in a proper scale of values for case deciders pressed by too many cases, maybe this emphasis on style and perfection is wrong."

Judge Godbold also suggested that district courts might rely less on the written word. An example of writing overuse, he said, was a habeas case where a side issue—whether the testimony of the state trial judge should be taken live or by deposition or affidavit—produced four sets of briefs, punctuated by two written motions for extensions and two written extension orders. The issue was decided eight months after it was raised. "The dispute could have been solved in 10 minutes by calling the lawyers in and having the judge decide it."

"If a district court is drowning in paper," he said, the court will have to ask itself if that has happened "because the judges permit it, or require it, or find themselves unable to break free of the quicksand."

Chief Judge James R. Browning of the Ninth Circuit also started with the proposition that "the constantly rising volume of litigation will not go away." He noted that in the last quarter century, the caseload of most federal judges has doubled or tripled, despite increases in the number of judges.

"Thus far," he said, "the difference has been bridged...primarily by the adoption of innovative techniques. But the upward trend in filings continues unabated. The problem will not go away. We must continue to develop more efficient ways of managing our affairs—through greater decentralization, improved organization, better planning, improved case management, vigilant monitoring of the processing of caseloads, more effective use of advancing technology, development of workable alternatives to the judicial resolution of disputes. And we must do this in such a way that management does not intrude upon the performance by judges of their essential task of judging, but instead frees them to judge more effectively."

One radical change that would have a dramatic timesaving effect—discretionary review in the court of appeals—is being circulated for comment by the Ninth Circuit Judicial Council's senior advisory board, Judge Browning said. He also noted the widespread efforts in courts throughout the circuit to promote alternative dispute resolution programs.

"The 'good old days' are gone," Judge Browning concluded. "They will never return again. An ever-growing share of our people are seeking to protect their interests and vindicate their rights in federal court. If the benefits our society derives from the federal court system are to survive, we cannot assume that any of our practices are beyond improvement."

Chief Judge Spottswood W. Robinson III of the District of Columbia Circuit also noted the relentless increase in that court's caseload. Among the steps implemented to handle the crush, he reported, were a civil appeals management program and a screening program to detect jurisdictional problems earlier in the appellate process.

Chief Judge Harrison L. Winter of the Fourth Circuit noted at his court's circuit conference that "the caseload...after a brief respite, is again on the rise." The court has been successful, he said, in eliminating "bottlenecks" in the appellate process. That has meant that "the supply of cases mature and ready for argument rose sharply during the last 12 months."

The load has required 15 judges a month, and since the circuit has only 11 active judges, and two senior judges "who continue to work substantially full time," the gap has been filled by district judges in the circuit who serve by designation. ■

THE THIRD BRANCH

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.

CALENDAR

Sept. 4-7 Tenth Circuit Judicial Conference

Sept. 5-8 Second Circuit Judicial Conference

Sept. 8-13 Seminar for Newly Appointed Bankruptcy Judges

Sept. 9-11 Regional Seminar for Probation Officers

Sept. 9-13 Video Orientation for New Probation/Pretrial Officers

Sept. 11-13 Seminar for Magistrates of the Fifth and Eleventh Circuits

Sept. 16-19 Video Orientation for Newly Appointed District Judges

Sept. 16-19 Regional Seminar for Probation/Pretrial Officers

Sept. 16-20 Video Orientation for New Probation/Pretrial Officers

Sept. 17-18 Judicial Conference of the United States

Sept. 17-19 Regional Seminar for Probation Officers

Sept. 23-27 Video Orientation for New Probation/Pretrial Officers

Oct. 2-4 Juror Management Workshop

Chief of AO Bankruptcy Division Appointed

Francis F. Szczebak has been named chief of the Bankruptcy Division of the Administrative Office.

The appointment was announced in June by Joseph F. Spaniol, Jr., former AO deputy director.

Mr. Szczebak, who has held a variety of posts at the AO since 1978, assumed his new post in July. He is a graduate of Defiance College in Defiance, Ohio, and Suffolk University Law School, and holds an LL.M. degree from George Washington University. ■

Filings Up Again in Most Appellate and District Courts

A large majority of the courts of appeals received more cases this year than last, an Administrative Office report shows.

This report, *Federal Judicial Workload Statistics*, prepared by the AO's Statistical Analysis and Reports Division, covers the 12-month statistical year ending last March 31. It shows that the Federal Circuit had the largest increase in new cases in the period surveyed, a rise of 150 percent. The court's terminated cases rose by 40 percent.

The second-largest increase was in the District of Columbia Circuit, where 33 percent more cases were filed than in the previous period.

The Second, Third, Fifth, and Seventh Circuits all reported slight decreases in new cases filed for the 12-month period. Terminations did not equal filings in the appeals courts. Excluding the Federal Circuit, terminations rose 1.5 percent and filings were up 6.4 percent.

The report also found that the number of civil cases filed in all the district courts rose by 3.3 percent during the period studied. The courts terminated 12.5 percent more civil cases than they did in the earlier period. The number of criminal cases filed in the district courts rose 8.3 percent in the period, more than offset by an 8.9 increase in terminations of criminal cases in that same time.

Filings in the bankruptcy courts rose 1 percent during the period, while terminations increased by 6 percent. ■

Judicial Evaluation Guidelines Approved by ABA House of Delegates at Annual Meeting

Before journeying to London to meet with the membership of the Law Society of England and Wales, members of the American Bar Association met in Washington, D.C., to consider pending issues, including some of significance to the federal judiciary.

Starting in 1982, a major effort was launched by the ABA to develop guidelines for evaluating state and local judiciary. The redrafting of these guidelines, after extensive meetings and debates for the next three years, emphasized that they were not meant to be hard rules for judicial performance or conduct, or a substitute for polls, but, rather, guidelines for an evaluation process. This was necessary, the special committee on evaluation of judicial performance said, to assure fairness and to accomplish the ABA's goal—high-quality performance by judges. The committee developed redrafts to meet objections of both lawyers and the judiciary after failing to achieve approval at the midyear meeting of the House of Delegates last February, and the revised guidelines were approved in July.

A proposal that the guidelines include federal judges was defeated after the Conference of Federal Trial Judges argued that the federal judiciary is already specifically covered by the Judicial Conduct and Disability Act of 1980, as well as by procedures established by the Judicial Conference of the United States.

Class actions again had the attention of the House when the sections of litigation and antitrust law pushed to amend rule 23 of the Federal Rules of Civil Procedure. One of 40 proposals would amend the rules relating to requirements for certifying class actions and would allow federal judges to use their discretion in excluding individuals from a class. Opponents of aspects of these proposals believe that the changes suggested would allow cases to be certified as class actions that would, under present rules, be disallowed. The Antitrust Law Section has consistently opposed this change. The House took no action but did authorize the sections to present their recommendations directly to the Advisory Committee on the Rules of Civil Procedure.

Chief Justice Burger attended both the Washington and London sessions. In London, where programs were designed for the common interest of both the United Kingdom and the United States, several issues were discussed and vehemently debated by representatives of the ABA and the Law Society. Eliciting the most interest was the discussion of international terrorism, presided over by former vice president Walter Mondale. Other panelists included Britain's home secretary, Leon Brittan, FBI Director William Webster and his counterpart in England, Scotland Yard Chief Sir Kenneth Newman, and counsel to the State Department Abraham Sofaer, a former federal judge in the Southern District of New York. The panelists and many in the audience agreed that immediate and drastic steps must be taken to end terrorism and to prevent repetition of recent incidents such as the hijacking of a TWA plane in Athens.

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YOUNG, from page 1

our subcommittee and then, usually, following the recommendation of GSA, we proceed with allowing them to go ahead and get the additional space.

In many instances in the past decade, Public Works Committee approval or denial of the requested authorization for new space has taken years. Is there any way to expedite the process?

Through the new chairman of the subcommittee. Each chairman does different things on a priority basis. They run their subcommittees differently, and when I became the chairman of this subcommittee three years ago, and Clay Shaw, from Florida, became the ranking minority member, we agreed that we would do everything we possibly could to make the subcommittee as effective as it possibly could be. The additional help of Mr. Shaw on the subcommittee because he is a lawyer and former mayor of Fort Lauderdale, Fla., gives us a pretty good insight into the problems. My background is in the construction business so they don't have to have a bunch of maps to tell us about a court or about how to get the thing built. So we have made the process move a lot faster, in my judgment, than in the other years that I have been here on the full committee.

Are the members of the committee selected or appointed by the speaker because of any special background?

Not necessarily. When we are all elected, we are asked by our respective party caucus chairmen what committees we would like to serve on, and I think Mr. Shaw's main committee is the Judiciary Committee because he is a lawyer. My main committee is Public Works and Transportation because of the jurisdiction we have over water, aviation, transportation, and then the public buildings section. So automatically I thought I could do more good for my area. My second choice is science and technology, which is considered a nonmajor committee. But I have been very interested in nuclear energy and the use of fossil fuel. So that all fits in pretty well. My area has McDonnell-Douglas, Emerson Electric, Monsanto, and Mallenkrodt Chemical Co., and a lot of the research and development comes through the Science and Technology Committee. Those, then, are two natural committees for me, particularly as they relate to the middle part of the country and the things that are important in my area.

Does your whole subcommittee meet en banc?

Yes, but in a subcommittee like this, because it doesn't necessarily attract headlines, it's Mr. Shaw and I most of the time. But we call out and get the members to attend if we think they have an interest in a specific matter. But it is really more of a housekeeping type of activity. It's very important, and I am sure that when we are through you will realize that this is a very important subcommittee, but if you ask most of the members they would hardly recognize what the subcommittee does. When we found out the number of federal buildings that we have under our jurisdiction, we realized it was incredible. We are paying rent of $1 billion a year for leased space in commercial buildings. Now if that doesn't shake the public up, I don't know what will. But Mr. Shaw and I feel that if we can get Uncle Sam to buy these buildings or if we get him to lease them for 10 years with an option to buy them after the end of 10 years, it becomes a part of the federal inventory and we get out of paying these ridiculously high lease costs. Most of the state legislatures have a capital-improvements budget, where you set aside $40 million to build a new state office building so that you are not in leased space. One of the things we have talked about is that GSA starts seeing the building needs, then they think, "Well, it's easier and it hardly shows up in the budget to go out and lease space." We've just never been very comfortable when you take a look at a 20-year lease that is going to cost the government $40 million to $50 million at the end of that 20-year period and all you have is rent receipts. It's hard now, particularly in the budget crunch we have all the time, but we're fighting constantly to get more general revenue money so that we can have GSA build a building and move the people out of leased space. So that's kind of the thing that Mr. Shaw and I are thinking about—whether we can accomplish that. It's a big process and will take many years.

"We've just never been very comfortable when . . . a 20-year lease is going to cost the government $40 million to $50 million [and] at the end . . . all you have is rent receipts."

The Public Buildings Act of 1959 includes language providing that approval of the House committee would not be necessary for "any alteration and acquisition authorized...the estimated maximum cost of which does not exceed $200,000." That amount was increased to $500,000 in 1972, 13 years later. Is it now timely, in view of the high degree of inflation, to substantially raise this amount again?

I have no problem with that. We had talked about raising it to $1 million before they'd have to get our approval, but I don't know of anybody who has really complained to us about it. It's just that with all the other things we have to do we just really haven't had time to address it, but I would have no problem with

that. I don't think it hurts to have us take a look at those sorts of appropriations, though, so the $1 million seems kind of small. Just so they don't start moving it where the legislature doesn't have some control. But I would have no basic problem increasing that amount because of inflation and things like that to $1 million or any other figure that would seem reasonable.

Once a prospectus has been approved, how is it funded?

That's not really part of my business, but I would assume that most of this would go right on to the appropriate House appropriations subcommittee, and in this particular situation Congressman Neal Smith from Iowa is the chairman of the Subcommittee on Commerce, Justice, State and Judiciary. He looks at that. He recently saw some figures on some of the prospectuses and he thought we were not getting much for our dollar on a couple of the items in the Washington area. I think he felt that GSA could have reached a better agreement with the lessors, and I understand he just released the funds on one particular building because he just thought that the price was too high. So he had his staff reevaluate that lease, and I assume that they figured out that was about all they could do. At least there is that sort of check on what we do, but the money would come from the appropriations subcommittee.

Do you work closely with the House Appropriations Committee?

Closely enough. Maybe there should be a closer relationship because they're paying the bills and we're authorizing the leases.

I understand that GSA forwards all prospectuses for a given fiscal year for all three branches of government in January of each year. How do you determine when you will consider a specific prospectus, and do you consider all of the judicial branch prospectuses at the same time?

The staff look over the prospectuses before I ever see them, and they kind of cull them out—the ones that they think would need a closer review or at least should be brought to the subcommittee members' attention. It works out that way, and we do not consider all the judicial branch prospectuses at one time. A lot of the judiciary is in federal buildings. That is very, very helpful. You've got small towns where the building is old or something like that—that's when we get involved. Under my chairmanship I've established an open-door policy with GSA so they are able to come in here and make an appointment and go over those items that are really critical.

"I've established an open-door policy with GSA so they are able to come in and go over those items that are really critical."

Is your subcommittee constituted in such a way that emergency action can be taken if needs are critical?

Yes, and we work very closely with GSA.

If GSA simply does not have sufficient money to complete a necessary building, can your subcommittee help?

Yes. We can move on an emergency basis because our staff is rather small and GSA has already gathered together the information from the agencies. So our subcommittee doesn't have to go back out in the field and make a determination of how many employees there are, and whether they are using the guidelines set by the president to keep within 135 square feet per employee. Generally, that's the figure the president has asked us to keep to, and so they have all that documentation ready for us and then we can recheck it if we want. I think we've had a good relationship, particularly as a Democrat working with a Republican administration. The heads of the GSA, when they are appointed, usually come in and we have a talk, and I think we understand each other right from the start. I'm not hard to talk with. We are very accessible—as much as we can possibly be—and then I think that if they don't have sufficient money, we can make a case with the appropriate appropriations subcommittee, and then we can also help them make a case before the Office of Management and Budget.

Have you ever had really strong differences with GSA, say, over whether something was too extravagant?

When I first came in, during the Carter administration, I was not chairman. I became chairman when President Reagan became president in 1981, so I don't know how the relationship with the subcommittee was before that, but we've had a good relationship with GSA and we disagree with them on many things. Now, were the 20- and 25-year leases signed back with Carter and Ford and Johnson? I don't know because I didn't think I had to go back that far, but GSA just started bringing in lease after lease with 20-year expiration dates and I said there's no way, unless it is an absolute emergency, that I'll approve or authorize any 20-year lease. Bring me something else back. I prefer five- and at the maximum 10-year leases. That would be the maximum of what we are approving right now, a 10-year lease, and we keep asking them to try and get options to buy the building.

With the idea that it would give you another review?

No. We try to encourage building new buildings or buying existing buildings. That's our goal. We could authorize $500 million tomorrow on new buildings in San Francisco, Oakland, Houston, Dallas—some of the areas where we are paying such high rents per square foot. That would be one of my goals—to have the administration in power give us more money to have GSA build new build-

See YOUNG, page 6

YOUNG, from page 5

ings. We have to change the act. I think that there is a building fund, and I think it's only about $100 million this year, and all they are authorizing is the building of three border patrols. My $60 million annex out in St. Louis, where the Army records center burned back in 1973, and where all the Army records are kept—they have come up with a proposal to build an annex to store the restored records. So [then-OMB director] David Stockman gave them very little money for new buildings. We have the authority to override OMB but that doesn't mean the president will let the agency spend the funds. But at least at this point we are getting along with them the best we can. But we could sure use a lot more money in the capital building fund, and I guess that's the bottom line on that.

"We have the authority to override OMB but that doesn't mean the president will let the agency spend the funds."

How much of a staff do you have to handle what must be a vast amount of paperwork and call for considerable expertise? How is it organized?

The staff director has been here longer than I have. She is considered the expert on the GSA budget and the housing needs. So I depend on her quite a bit. I think the only personal staff member that I have is Vicki Schaaf.

We also have a subcommittee secretary. The minority has the same setup. So Mr. Shaw has the same number of people to work for him that I have. Among the six of them they do all the work. There is no organizational chart. I don't know if we would do better by having 16 rather than three.

You have hearings out in the field?

Yes. This subcommittee could be gone from Washington all the time—and I think it would be beneficial to the taxpayers—but you have to make roll call.

The judicial branch, like other entities in the government, now pays rent to GSA. Is it a waste of time and money to have one agency paying another?

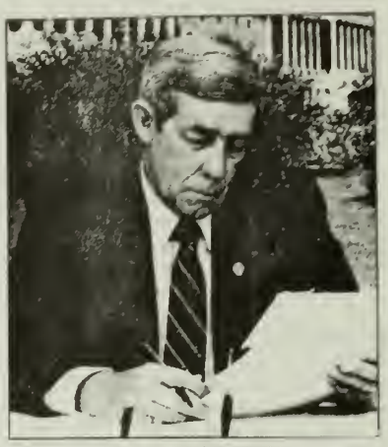
I don't know the answer to that question. With GSA being the government's landlord there is an economy of scale. Meaning they are so large they can bargain with a landowner more effectively because they are not just moving in a group of people. If you have 150 judges trying to get space for themselves and their staffs, they're all off on their own different agendas. If they have to adhere to GSA, the GSA person has more clout to deal with the landlord. Plus GSA does all the maintenance and they are more cost-effective because they are larger and they do all of the rental and the housekeeping as well. It seems to be about the only system that can work—that GSA has to charge the tenant out of its own fund because those funds are coming from another appropriation process.

Do you pay rent here?

No. Just for supplies and things like that. In the Capitol, Congress does not pay rent. In fact, we own the place.

Do you ever get calls or questions directly from the judges?

There is a proposed courthouse and federal building in Los Angeles that we have approved, and some of the judges are not completely happy with the housing that they might have in the future. They are going to build in that area a new federal courthouse for federal employees. The judges don't want to leave the old courthouse but we've agreed with the chairman of the subcommittee on appropriations, who is from Los Angeles, that it won't be that inconvenient to the judges to have two different buildings that they have to operate under, because it is my impression that the older, more



Congressman Robert A. Young

senior judges will stay in the older facility in downtown L.A. and the newer judges will move into the new facilities. So I think their concern is not well-founded. I can understand their wanting all to be in one building but it just doesn't seem possible to work it out. We've had correspondence from one judge and we've answered and just said we disagree.

I have had a phone call from the Chief Justice of the United States, Warren Burger. He wants a new administrative office building for consolidation of all of the administrative employees of the judicial branch. They are in about nine different places throughout the whole Washington area. So I agreed with the Chief Justice and I agreed that we ought to build them a new building. So we passed that out of my subcommittee to the full committee and it is now waiting final action in the House of Representatives. It's going to be the newest federal building after the Library of Congress and the Hart Senate Office Building. It will be the latest one in the Capitol complex.

A chief judge, John F. Nangle, came to Washington to ask for improvements at the federal courthouse in St. Louis. And being from St. Louis I was very familiar with the courthouse and could understand some of the problems. He felt they were subject

See YOUNG, page 7

YOUNG, from page 6

to unsafe practices. One thing in particular is where you come in off an alley and there is an elevator going up—not a public elevator, but an elevator where you bring supplies in—and that's where they bring the prisoners in. So here you have a judge on an elevator. They are bringing a prisoner in. He's probably going to sentence him in the next 15 or 20 minutes. That made no sense to me. The elevators are slow and it seemed a very bad security risk.

How about the public elevators? Can't the judges use those or would that be worse?

Well, then they are out in the front with the general public. Seeing the judge, someone might say, "Don't be mean to my son" or something like that. So I think they need something different. Last year we approved a prospectus and allocated $9.5 million to improve the conditions at that courthouse and the improvements were a new judges' entrance and the new courtroom. And we put in a new fire sprinkler system. The building had been built in the early 1930s by the WPA. Good building. And repairs to the heating and the air conditioning system.

Going through different courts throughout the country, I have been concerned about the security at the entrances, to try to make sure that our buildings are protected from terrorists. So we insisted that all of the new buildings that are being built have better security systems.

And you inspect for that?

We were in Fort Lauderdale about a year ago when the biggest drug bust in heroin that DEA had ever made coming in and out of one of the South American countries took place. I was surprised with what I thought was the lack of security for those agents who were holding the drugs to present to the judge as the judge was trying this case of these two people who had been caught with the drugs. It seemed to me that the building should have been more secure. So we worked with GSA and that security is being tightened up in Fort Lauderdale. It just didn't make sense that there wasn't better security.

Who goes with you? Do you just pop in unannounced?

Staff, but not necessarily. I've done it on my own, but it's no witch hunt we're holding, and I think we get a lot more out of it if we have the office that's responsible for it present and we can see the faulty things on our own. So we can work closely with GSA.

Have you ever walked into an office and seen something that you thought was rather outlandishly expensive, unnecessary, or very elaborate appointments to an office—something you felt was needlessly expensive?

Truthfully, in the short time that I have been chairman, the answer would be no. I just can't think of anything that surprised me—that the administrator of a court or the federal marshal had any extra adornments in their office or anything like that. I just can't think of anything. I'm sure there is, but nothing that has been brought to my attention. ■

Four New Publications Available from Center

The Center recently published *Attorney Fee Petitions: Suggestions for Administration and Management*, by Thomas E. Willging and Nancy A. Weeks.

Building on Prof. Arthur Miller's seminal report, *Attorneys' Fees in Class Actions* (Federal Judicial Center 1980), the authors use a case-management perspective to review cases, statutes, local rules, and other materials affecting judicial management of attorney fee petitions.

The report follows a three-part approach to the fee application process, covering establishment of guidelines at the pretrial phase, the fee applications—including the steps involved in applying the lodestar method—and consideration of alternative approaches to the troublesome problem of simultaneous negotiation of attorney fee issues and the merits of the litigation. With regard to the pretrial phase, the authors explore alternative uses of nonjudicial personnel to handle routine aspects of the fee application process. They also discuss techniques for streamlining the repetitive aspects of managing attorney fee applications and disputes, such as use of standardized formats to simplify decisions about market rates and use of local rules to establish a standard process for discovery and settlement.

* * *

A new edition of *The Sentencing Options of Federal District Judges* is available now for distribution.

This work, by Anthony Partridge of the Center's Research Division, was published in 1979 and last revised in June 1983. The current revisions reflect recent legislative changes—such as the repeal of the Youth Corrections Act and enactment of the Fine Enforcement Act—as well as administrative and case-law developments. The new edition is current to April 30, 1985.

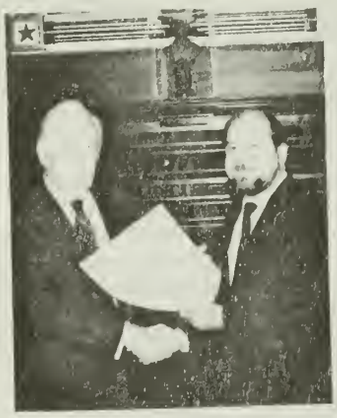
Copies of the work will be distributed to district judges, full-time magistrates, probation officers, and public and community defenders, as well as to other persons in the judicial branch who have requested previous editions. Copies will also be provided to the Department of Justice for the use of government attorneys.

* * *

Another recent publication is *Visiting Judges in Federal District Courts*, by Donna Stienstra of the Center's Research Division, prepared to assist courts that occasionally need the temporary services of a judge from another district or appellate court.

Based on information gathered from clerks in 18 district courts, this report describes the methods some districts use to ensure that a visiting judge's stay is satisfying and produc-

See REPORTS, page 10



The Institute for Court Management held its 17th graduating ceremonies for the Court Executive Development Program at the Supreme Court in June. Pictured is the Chief Justice congratulating George Ray, chief deputy clerk (N.D. Cal.), one of five federal employees in the program.

ABA, from page 3

Another program, staged after months of planning, "Justice for a Generation," focused on what ABA President John Shepherd said was "a special responsibility to deal with issues unique to our time." Topics such as foreign investments in the United States, practicing law abroad, computers, alternative dispute resolution, juries, lawyer competency and bar admissions, comparative costs of litigation in England and the United States, and conducting discovery abroad were discussed. American participants and paper writers included former federal judge Marvin E. Frankel (S.D.N.Y.), U.S Magistrate Wayne Brazil (N.D Cal.), senior federal circuit Judge Malcolm R. Wilkey (D.C. Cir.), and Center Director A. Leo Levin

Discussed at length during a meeting at the Notre Dame Law School Center in London was what is being done to assure continuing judicial education, where it is being done, and whether it is being done effectively. Participants from Italy, Ireland, and Australia, as well as those from the United States and England exchanged ideas, and questions came from members of the audience, who represented other nations. Lord Chief Justice Lowry of Northern Ireland delivered the keynote address. Director Levin described the work of the Federal Judicial Center and Justice Florence Murray (S. Ct. R.I.), the operations of the National Judicial College. Talbot D'Alemberte represented the American Judicature Society, and Samuel J. Roberts, former chief justice of the Pennsylvania Supreme Court, described the work of the ABA Legal Education and Admissions to the Bar Section. ■

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

American Bar Association. *Justice for a Generation.* 1985.

Committee on Corrections. "Can Our Prisoners Become 'Factories With Fences'? " 40 *Record of the Association of the Bar of the City of New York* 298 (1985).

Feinberg, Wilfred. "The Office of Chief Judge of a Federal Court of Appeals." 53 *Fordham Law Review* 369 (1984).

Friendly, Fred W. (moderator). "The Federal Judiciary: What Role Politics?" (Transcript of panel discussion at American Judicature Society meeting). 68 *Judicature* 330 (1985).

Gibbons, John J. "The Antitrust Jurisprudence of the Third Circuit." 40 *Record of the Association of the Bar of the City of New York* 198 (1985).

Goldman, Sheldon. "Reaganizing the Judiciary: The First Term Appointments." 68 *Judicature* 313 (1985).

"The Insanity Defense." In *Annals of the American Academy of Political and Social Science* (vol. 477). 1985.

Johnston, David F. "The Equal Access to Justice Experiment." 32 *Federal Bar News & Journal* 176 (1985).

McGowan, Carl. "The Administrative Conference: Guardian and Guide of the Regulatory Process." 55 *George Washington Law Review* 67 (1984).

Re, Edward D. "Legal Writing as Good Literature." 59 *St. John's Law Review* 211 (1985).

Report of the Proceedings of the Judicial Conference of the United States (March 6-7, 1985).

Simon, Roy D., Jr. "Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees." 53 *University of Cincinnati Law Review* 889 (1984).

Steele, Walter A. "The Honorable Jean S. Breitenstein—A Profile." 62 *Denver University Law Review* 1 (1985).

Stolz, Barbara Ann. "Congress and Criminal Justice Policy Making: The Impact of Interest Groups and Symbolic Politics." 13 *Journal of Criminal Justice* 307 (1985).

Wald, Patricia M. "The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values." 33 *Emory Law Journal* 649 (1984).

Rep. Rodino to Receive Award at Court Conference

Chief Justice Warren E. Burger will present an award to Congressman Peter W. Rodino, Jr., chairman of the House Judiciary Committee, at the second annual Judicial Conference of the United States Court of International Trade. The conference will be held on Oct. 23, Chief Judge Edward D. Re has announced. It will take place at the World Trade Center in New York City, beginning at 9 a.m.

Those interested in attending should register before Sept. 20 by contacting the Office of the Clerk, U.S. Court of International Trade, One Federal Plaza, New York, N.Y. 10007.

PERSONNEL

Nominations

Ferdinand F. Fernandez, U.S. District Judge, C.D. Cal., July 19
Stephen H. Anderson, U.S. Circuit Judge, 10th Cir., July 23
Ralph B. Guy, Jr., U.S. Circuit Judge, 6th Cir., July 23
Glen H. Davidson, U.S. District Judge, N.D. Miss., July 23
Robert B. Maloney, U.S. District Judge, N.D. Tex., July 23
David B. Sentelle, U.S. District Judge, W.D.N.C., July 25
Brian B. Duff, U.S. District Judge, N.D. Ill., Aug. 1

Confirmations

Wayne E. Alley, U.S. District Judge, W.D. Okla., July 10
Robert C. Broomfield, U.S. District Judge, D. Ariz , July 10
Claude M. Hilton, U.S. District Judge, E.D. Va., July 10
James D. Todd, U.S. District Judge, W.D. Tenn., July 10
Donald E. Walter, U.S. District Judge, W.D. La., July 10
J. Frederick Motz, U.S. District Judge, D. Md., July 11
Roger J. Miner, U.S. Circuit Judge, 2nd Cir., July 19
Roger L. Wollman, U.S. Circuit Judge, 8th Cir., July 19
Richard H. Mills, U.S. District Judge, C.D. Ill., July 19
Roger G. Strand, U.S. District Judge, D. Ariz., July 19
John M. Walker, Jr., U.S. District Judge, S.D.N.Y., July 19

Appointments

Charles C. Lovell, U.S. District Judge, D. Mont., May 10
Howell Cobb, U.S. District Judge, E.D. Tex., May 17
Joseph H. Rodriguez, U.S. District Judge, D.N.J., May 22
Mark L. Wolf, U.S. District Judge, D. Mass., May 24
Sam B. Hall, Jr., U.S. District Judge, E.D. Tex., May 28
George F. Gunn, Jr., U.S. District Judge, E.D. Mo., May 29
Edith H. Jones, U.S. Circuit Judge, 5th Cir., May 30
Ann C. Williams, U.S. District Judge, N.D. Ill., June 3
Kenneth F. Ripple, U.S. Circuit Judge, 7th Cir., June 10

Elevations

Donald J. Porter, Chief Judge, D.S.D., July 1
Maurice B. Cohill, Jr., Chief Judge, W.D. Pa., July 2

Senior Status

Miles W. Lord, U.S. District Judge, D. Minn., May 20
Myron H. Bright, U.S. Circuit Judge, 8th Cir., June 1
Jack Miller, U.S. Circuit Judge, Fed. Cir., June 6
Leland C. Nielsen, U.S. District Judge, S.D. Cal., June 14
Andrew W. Bogue, U.S. District Judge, D.S.D., July 1
Lee P. Gagliardi, U.S. District Judge, S.D.N.Y., July 17

Deaths

Thomas P. Thornton, U.S. District Judge, E.D. Mich., July 1
Harry Phillips, U.S. Circuit Judge, 6th Cir., Aug. 3

NOTEWORTHY

Less Time. The time convicts spent in state prisons dropped to a record low in 1982, the Justice Department has found.

The department's Bureau of Justice Statistics reported that the median confinement was 1.8 years. It based its findings on an examination of the sentences of 157,000 released prisoners in 29 states and the District of Columbia in 1982, the most recent year for which records are available.

* * *

Less Crime. Serious crime dropped again last year, but violent crime rose slightly, the FBI reported in its annual crime survey.

All serious crimes—murder, rape, robbery, theft, and burglary—dropped for the third consecutive year, to the lowest level since 1978. There were 11.8 million such crimes in 1984.

Violent crime increased by 1 percent. The number of rapes and assaults rose, but murders and robberies declined.

Four Pakistani judges visited the Federal Judicial Center for a day-long briefing on Center activities during a six-day trip to Washington recently. The guests were (l. to r.) Chief Justice Javid Iqubal of the Lahore High Court, Chief Justice Abdul Kureshi of the Sind High Court, Justice Ali Qazilbash of the Peshawar High Court, and Justice Mumawwar Mirza of the Baluchistan High Court. Each of the courts is the highest in its state.

REPORTS, from page 7

tive for both the visitor and the court. It covers issues such as selecting and preparing the visiting judge's caseload, arranging for his or her travel and accommodations, providing an orientation to the court, and the impact of a visitor on court staff and facilities.

Appended to the report are a list of 10 "essential ingredients" for a visit and two visiting judge checklists developed by one district court.

* * *

The Center recently published *The Roles of Magistrates: Nine Case Studies*, by Carroll Seron. The report, a follow-up to an earlier Center study on the same topic (*The Roles of Magistrates in Federal District Courts*, FJC 1983), takes a detailed look at nine district courts' use of magistrates for pretrial case management. Three approaches to the use of magistrates are identified: (1) In some courts, magistrates play the role of peers, or "additional judges," in court administration and case management; (2) in other courts, they are viewed as specialists who become experts in particular areas of the docket, such as Social Security or prisoner cases; and (3) in still other courts, they are considered members of a team and are given discretionary responsibility for the pretrial phases of case processing.

The report also examines the extent to which the outcome of magistrates' work is questioned by lawyers, finding that magistrates' reports and recommendations generally are not challenged. The author concludes that magistrates are making a significant contribution to case management and conservation of judicial time, and that this contribution can be further enhanced if the bar and court staff are educated about the potential roles of magistrates.

* * *

Copies of these reports can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed label, preferably franked (but do not send an envelope). ■

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THE THIRD BRANCH

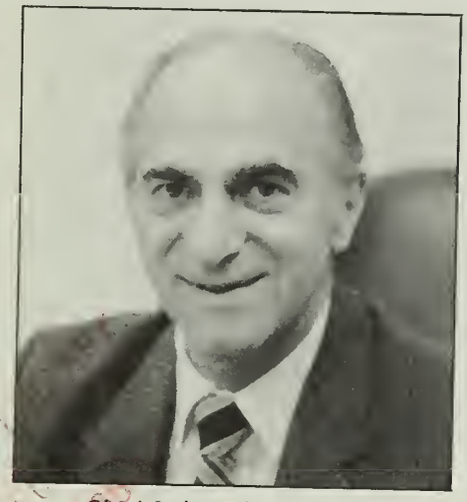
VOLUME 17
NUMBER 11
NOVEMBER 1985

GOVT. DOC.

hief Judge Re Discusses International rade Court's Jurisdiction and Procedures

he subject of this month's interview is f Judge Edward D. Re, who has been f Judge of the U.S. Court of International e since its creation in 1980. He pre-ly was Chief Judge of the U.S. Customs t.

addition to 17 years of judicial expe-. Chief Judge Re's distinguished record les service as Chairman of the U.S. gn Claims Settlement Commission 1-68) and as Assistant Secretary of for Educational and Cultural Affairs 8-69) and 11 years' membership on the York City Board of Higher Education. ief Judge Re holds nine honorary degrees dition to his B.S., LL.B., and J.S.D. s, and in 1980 he was named Distin-ed Professor of Law by St. John's Uni-y School of Law. He has written ively on brief writing, opinion writing, umerous subjects in the international eld.



Chief Judge Edward D. Re

u have been the Chief Judge of United States Court of Interna-l Trade since it was created.

Why was this court created?

As you know, the United States Court of International Trade is a national Article III court. The geographical jurisdiction of the court extends throughout the United

See JUDGE RE, page 4

mmission on Bicentennial of Constitution eases First Report, Holds Public Hearings

September 17, the 198th anni-ry of the signing of the Consti-n, the Commission on the tennial of the United States titution released its first report, eld public hearings to learn of ctivities and recommendations public and private agencies ved in bicentennial planning.

hough preparations for the tennial were well under way e the Commission was formed e, the Commission, one speaker would "impart a sense of pur-and direction to the nation's emoration of the bicentennial" Constitution.

h the Commission's report, 12 days prior to the statutory ne, and those who testified at the hearings stressed the educational opportunity the bicentennial presents the nation—a chance for "a history and civics lesson for all of us," in the words of the Chief Justice, who is Chairman of the Commission. The occasion, one speaker said at the hearings, calls for *"cerebration* as well as *celebration."*

The Commission's report, inviting the participation of "[e]very state, city, town, and hamlet, every organization and institution, and every family and individual," outlined a three-phase effort, tracking the developments of two centuries ago. Emphasis from now until 1987 will be on the events leading up to the constitutional convention and the Con-

See BICENTENNIAL, page 2

Judicial Conference Recommends 47 More Bankruptcy Judgeships

The Judicial Conference, at its semiannual meeting in September, urged creation of 47 additional bankrupty judgeships. It voiced support for pending legislation to provide for reimbursement of visiting judges' actual expenses. The Conference agreed to recommend to Congress that it not pass legislation providing commuting expenses for judges and legislation requiring clerks of court to collect criminal fines.

Attorney General Edwin Meese addressed the Conference and promised that the Reagan Administration would move quickly to fill judicial vacancies. At that time there were 86 vacancies—66 on the district courts and 20 on the courts of appeals.

The Conference's recommendation on additional bankruptcy judgeships, which will be transmitted to Congress, calls for appointments in all circuits except the First, Second, and District of Columbia. The largest number of new judgeships would go to the Central District of California. (See box, page 7.)

Proposed legislation disapproved by the Conference included a bill that would authorize reimbursement of all federal judges for travel between their home and their official duty station. The other pending bill disapproved would have required court

See CONFERENCE, page 7

Inside...

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Parole Commission Issues Revised Guidelines ..... p. 3

BICENTENNIAL, from page 1

stitution itself. The Commission urged designating September 17, 1987, as a national holiday.

The year 1988 will emphasize the ratification debates. The year 1989 will focus on the creation of the new government and prepare the way for a celebration of the Bill of Rights.

Activities reported at the hearings included:

- More than 160 awards totaling more than $11 million, which the National Endowment for the Humanities has allocated to bicentennial projects.
- Plans by the National Archives, Library of Congress, and National Park Service for celebrations on key dates, as well as exhibits and accompanying public education.
- PROJECT '87, a joint venture of the American Historical Society and the American Political Science Association, which has for almost ten years been serving as a national bicentennial clearinghouse as well as sponsoring numerous educational programs.
- The American Bar Association's "We the People" bicentennial program.

Bicentennial activity to date has been characterized in large measure by scholarly symposia and academic research, as well as by summer seminars for law school, college, and secondary school teachers on teaching about the Constitution. As 1987 draws near, activity is moving toward a greater level of public education and citizen involvement. Various state and community organizations, the most important of which is the "We the People 200" effort, based in Philadelphia, are planning citizen-education forums. The hearings revealed more than 25 video and radio programs—from documentaries on the founding to contemporary analyses of key constitutional provisions—in various stages of planning or production.

The Commission's report also recommended certain changes in its authorizing legislation to increase the Commission's fund-raising capacity, as well as provide it additional staff. At this point the resources available to the Commission are far fewer than those available in the planning of the bicentennial of the Declaration of Independence in the 1970s.

The Center is distributing copies of the Commission's report to all federal judges. Others who wish copies can obtain them by sending a self-addressed label, preferably franked, to the Information Services Office, 1520 H Street, N.W., Washington, DC 20005. ■

1986-87 Judicial Fellows Program

Chief Justice Burger has announced the 1986-87 Judicial Fellows program. This program, patterned to some extent after White House and congressional programs, brings into the judicial branch highly talented young professionals who have an opportunity to make contributions to the work of the Supreme Court, the Federal Judicial Center, and the Administrative Office of the U.S. Courts. Each year one of the fellows is designated the Justice Tom C. Clark Fellow, a memorial arranged by Justice Clark's law clerks and friends and other supporters of the program.

Application forms and further information about the program can be obtained from the office of the Administrative Assistant to the Chief Justice, Supreme Court of the United States, Washington, DC 20543. Applications should be mailed by Nov. 8 to assure consideration.

Asbestos Litigation Burdens Subject of New Research to Be Conducted by FJC

The Federal Judicial Center is undertaking new research into the burdens imposed by asbestos litigation in some district courts. The Center plans a systematic analysis of the costs and effectiveness of alternative procedures for management of asbestos cases and other toxic-tort litigation. Information will be gathered from court records, Administrative Office statistics, and interviews with judges, lawyers, clerks, and others.

An FJC report based on a 1984 asbestos litigation conference noted that "case management crises" in several districts with heavy asbestos caseloads could be addressed only by dramatic changes such as increases in personnel or restructuring of the court's system of calendaring. The report also noted that "[s]tatistics on asbestos cases in federal courts fail to reflect the burden of those cases in some districts and may result in a failure to allocate adequate resources to courts with heavy asbestos caseloads," and it called for further study of those burdens.

The conclusion that drew the most attention, however, was that "asbestos cases have become relatively routine products liability cases" that are susceptible to traditional case management practices, especially the setting of firm, credible trial dates.

The new research comes in part in response to the report's recommendations for further study and to concerns expressed by several members of the judiciary that participants in the conference did not adequately address the question of the burdens of managing asbestos cases. ■

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Editor

Alice L O'Donnell, Director, Division of Interjudicial Affairs and Information Services, Federal Judicial Center

Third Circuit Issues Report on Court-Awarded Attorneys' Fees

A Third Circuit task force on court-awarded attorneys' fees commended last month that such es be set on a percentage basis in ses in which a common recovery nd will be created, and that the cur-ntly used "lodestar" method for mputing awards in some statutory-e cases be revised.

The task force's report, "Court warded Attorney Fees," urged dif-rent treatment for cases in which mpensation comes out of a com-on fund and those in which the suc-ssful litigant recovers fees under a e-shifting statute.

Headed by Judge H. Lee Sarokin .N.J.), the task force was asked to termine what changes, if any, were eded in the current Third Circuit ethod of determining the amount court-awarded attorneys' fees.

The Third Circuit has for the past cade followed the lodestar method. fee under that method is arrived at determining the number of hours asonably expended on the case and ultiplying by an hourly rate. That e is determined by such factors as e lawyers' experience, qualifica-ns, and reputation. The resulting nount—the lodestar—is then creased or decreased by a multiplier tor based on the risk involved in e case and the quality of the attor-ys' work.

Most other circuits have adopted e Third Circuit test or a similar ndard, so proposals to change that ethod may have a nationwide pact.

The task force found that the lode-r method was not the best one to e in cases in which there will be a mmon fund. It recommended, tead, that the court appoint a fee presentative early in the litigation o would negotiate with the puta-e class's attorneys on the class's alf to set a fair contingency fee. at fee, if approved by the court,

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AO Director Reports Increases in Court Filings

Administrative Office Director L. Ralph Mecham told the Judicial Conference in September that the federal courts' workload increased substantially again in 1985, with increases in virtually all courts and all categories of cases.

The Director summarized for the Conference the AO's annual report, which covers the statistical year July 1, 1984, to June 30, 1985. The annual figures show that—

- Filings in the 12 regional courts of appeals were up 6 percent.
- Filings in the Court of Appeals for the Federal Circuit rose 120 percent.
- Civil cases in the district courts rose 5 percent.
- District court civil cases in which the United States was plaintiff rose 22 percent.
- Criminal cases filed in the district courts grew by 5 percent.
- Bankruptcy filings rose 8 percent.

In each of those categories, the number of cases disposed of also rose over the previous year, but not fast enough to absorb all of the filing increases.

The annual report also summarizes activity under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. There were 191 complaints about judges filed in statistical year 1985, an increase of 8 percent.

U.S. Parole Commission Issues New Guidelines

The Parole Commission has amended its guidelines for treatment of youthful offenders and some adult offenders. The new proposals were published in the *Federal Register* as final rules on Oct. 3.

Among other significant changes, the Commission abolished the separate guidelines for youthful offenders—those sentenced under the Youth Corrections Act or the Narcotic Addict Rehabilitation Act and those who were less than 22 at the time of their offense. These inmates will be subject to the same new guidelines as adult offenders now are. Offenders of all ages guilty of less-severe offenses who are judged to be in the better-risk category will fare better under the new guidelines, and youthful offenders involved in serious crimes will be treated more severely than in the past, because they will be treated as adults.

The new guidelines will apply to any prisoner whose initial parole hearing is held Nov. 4 and after. They will also apply to recission and revocation hearings held after that date. Prisoners involved in interim hearings and prerelease record reviews after Nov. 3 will be covered retroactively by the revised guidelines if the new guidelines are more favorable.

The following table shows the new guidelines issued by the Commission:

OFFENSE CHARACTERISTICS: Severity of Offense Behavior	**OFFENDER CHARACTERISTICS:** Parole Prognosis (Salient Factor Score 1981)			
	Very Good (10–8)	**Good** (7–6)	**Fair** (5–4)	**Poor** (3–0)
	Guideline Range (in Months)			
Category One	≤ 4	≤ 8	8–12	12–16
Category Two	≤ 6	≤10	12–16	16–22
Category Three	≤10	12–16	18–24	24–32
Category Four	12–18	20–26	26–34	34–44
Category Five	24–36	36–48	48–60	60–72
Category Six	40–52	52–64	64–78	78–100
Category Seven	52–80	64–92	78–110	100–148
Category Eight*	100+	120+	150+	180+

*No upper limits are specified because of the extreme variability of the cases within this category.

JUDGE RE, from page 1

States. In fact, the court also is authorized to hold hearings in foreign countries. The court's subject-matter jurisdiction is exclusive, and includes judicial review of civil actions arising out of import transactions and federal statutes regulating importations. The existence of the court ensures expeditious procedures and avoids jurisdictional conflicts among the federal courts. Most important, it provides uniformity and consistency in judicial decision making regarding import transactions, as required by Article I, Section 8, of the Constitution. It may not be well-known, but the provision of the Constitution that authorizes the Congress to lay and collect taxes, duties, imposts, and excises also requires that all duties, imposts, and excises shall be uniform throughout the United States. A purpose of the court is to see to it that this requirement of uniformity is maintained.

What does the court do that wasn't done by the former Customs Court, of which you were also Chief Judge?

The new name more accurately describes the court's expanded jurisdiction and its increased judicial functions relating to international trade disputes. The new court has increased subject-matter jurisdiction, as well as plenary authority in law and equity that wasn't possessed by the former Customs Court. This was achieved by the Customs Court Act of 1980, which created the new court. The act conferred expanded subject-matter jurisdiction, which now includes just about all civil actions against the United States, its officers, or its agencies that arise out of the laws regulating imports. An important provision of the 1980 act made it clear that this court has all the powers in law and equity of, or as conferred by statute upon, the district courts of the United States.

So the provision put you on a par with the district courts?

The act conferred upon this court all of the powers both in law and in equity, possessed by the district courts, including the power to grant any relief appropriate to the case before it. I think it's also important to note that the act permits the Chief Justice of the United States to assign judges of this court to perform judicial duties in the courts of appeals of the United States as well as in the district courts.

Chief Judge Edward D. Re

You primarily hear challenges to administrative decisions made by agencies such as the Customs Service and the Treasury Department. Does that make your operations more like an appellate tribunal than like a trial court?

Well, yes and no. Yes, because from one standpoint you may say that you are appealing a decision of a department or administrative agency. From another standpoint, no, because in some categories, the cases are heard de novo. In other areas, judges of this court review administrative action, not de novo, but upon the record developed before an agency based on the usual standards of review applied by appellate tribunals. Hence, it may be said to be comparable to taking an appeal to an appellate court. However, it is important to keep in mind that the so-called administrative records presented to this court are not always comparable to the administrative records developed under the Administrative Procedure Act by other agencies whose administrative decisions are appealable directly to a court of appeals.

The records presented to us come from agencies that perform investigative rather than adjudicative functions. Therefore, in this court, much judicial time and effort is spent shaping the record itself and resolving disputes among the parties as to the record. There are preliminary skirmishes pertaining to the record upon which the court is to make its decision. The records that we review are not always comparable to the record that is presented to an appellate court. Once we decide a case, the question that will be presented to the court of appeals—in our case, the Court of Appeals for the Federal Circuit—is whether this court properly reviewed the record before it.

You mentioned before, Judge, that your court has exclusive jurisdiction over most of the cases it hears. Can you explain why this is so, and whether this is better than the situation that exists in the tax realm, where a plaintiff often has the choice of the Tax Court, the U.S. Claims Court, or a district court?

As I mentioned, our work could be divided into two types of cases. In the first, we try cases de novo in the traditional areas of jurisdiction of the old Customs Court, deciding whether goods that have been imported have been properly classified or assessed for customs duty purposes. These cases, by statute, are heard de novo. Here, there is a full-blown trial to determine whether the imported merchandise has been properly classified or assessed. In the second type of case, we review the administrative records of the agencies of government that deal with import transactions. The case could start with the action of the President himself, the President's Special Trade Representative, the Department of Commerce, the Department of the

"The records presented to us come from agencies that perform investigative rather than adjudicative functions."

Treasury, the International Trade Commission, or, of course, the Customs Service. We also hear cases that originate with the Department of Labor under the Trade Adjustment Assistance program.

I believe it is best to have those cases heard before this court not merely because of expertise, or uniformity and consistency. Although our subject-matter jurisdiction may be somewhat specialized, we are a generalist court which applies general principles of administrative law and equity. In addition to expertise, we have developed efficient and expeditious procedures for the disposition of these cases. It is simply good judicial administration to have all of these import-related cases heard before this court. If warranted, we may also grant a jury trial. Of course, in the future Congress may wish to consider whether for certain disputes—for example, those involving penalties and seizures—it would be appropriate to have concurrent jurisdiction.

Would concurrent jurisdiction with the district courts make it easier for litigants to litigate closer to home?

No. Although the courthouse is located in New York City, we can hear any one of these cases anywhere in the United States. While most of our cases are heard in New York, that doesn't prevent us from hearing cases in any other city. As a matter of fact, many of our cases are heard in Los Angeles, San Francisco, Chicago, Houston, Dallas, Washington, Boston, and Detroit; and, as I indicated earlier, the court is also authorized to hold hearings in foreign countries. So, without any difficulty, we can hold a trial anywhere in the United States.

What is the court's caseload like, and what's happened to it in the last several years?

The number of cases filed each year from 1970 to 1980 has decreased. Although from the standpoint of numbers the cases are fewer, they are much more complex and much more difficult. The difficulty and complexity reflect the great importance of international trade, particularly in the areas of dumping and countervailing duties. Since 1980 the number of filings and the cases assigned to each judge have generally been unchanged. So the best I can say is that although since 1970 the number of cases filed may be fewer, they're much more complex and surely require more time to be decided.

Does that mean you could use more judge power?

No, it does not. An indication of this is the fact that we have assisted the courts of appeals and many district courts whenever we could.

As the Chief Judge of the court, what are your administrative duties? Are they similar to those of the chiefs of the district and circuit courts?

Yes. They're just about the same; they are very similar to the administrative responsibilities of the chief judges of the district and circuit courts. I think I can best explain those duties by referring to the fine book published by the Federal Judicial Center, *Desk Book for Chief Judges of United States District Courts.* I've had occasion to read it, and found it very valuable. I want to congratulate the various authors who contributed to that book. The chief judge of a federal court ultimately is responsible for ensuring that the court is administered in compliance with statutes, Judicial Conference and court policies, and Administrative Office regulations. And in a broader sense I think it is the chief judge's duty to ensure that the court is administered effectively and efficiently.

There is one difference, however, between the duties of the chief judge of this court and the chief judge of a district court. Rather than using a random system for the assignment of cases, the chief judge of this court assigns the cases among the nine judges. This helps accomplish not only fairness in workload distribution but also, to a certain extent, expertise in various areas, and uniformity and consistency. Except for these differences, the responsibilities of the chief judge of this court are similar to those of the district courts and courts of appeals.

"We can hear . . . cases anywhere in the United States. . . . The court is also authorized to hold hearings in foreign countries."

Do you carry the same load as the other judges despite your administrative duties?

Yes, I do.

Your name is as well-known as the author of *Brief Writing and Oral Argument* as it is as a chief judge. How did you come to be a recognized authority on those subjects?

You take me back many years by that question. I've always been interested in language, writing, and literature. For many years I have been interested in attempting to improve the quality of legal writing, and the quality and effectiveness of briefs.

When I started teaching at St. John's Law School in 1947, I was made the Director of the moot court program. In that capacity I organized both trial and appellate moot courts. As a result, I lectured and prepared an outline on the writing of trial and appellate briefs. In 1950, Mr. Philip Cohen, who is the President of Oceana Publications, heard about these materials from students at St. John's and New York University. He asked to see my notes and stated that he wished to publish a book on the subject. In 1951 there appeared the first edition of my *Brief Writing and Oral Argument.* The book has gone though many revisions and is now in its fifth edition. Oceana had also published my first book, *Foreign Confiscations in Anglo-American Law.*

Has the quality of the briefs filed

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JUDGE RE, from page 5

in your court gone up or down in your time on the bench?

I think they are better, and for a very good reason—I think that lawyers are becoming increasingly aware of the importance of briefs. I usually start talks on brief writing by quoting a sentence from the famous case of *McCulloch v. Maryland:* I say, "When I say 'the power to tax is the power to destroy,' of whom do you think?" The audience will say John Marshall. Some may also say *McCulloch v. Maryland*. I then say, "That's correct, but you could also have said that those words were inspired by the *lawyer* who wrote the brief for the 'plaintiff in error' in that case, and his name is Daniel Webster." I try to have lawyers know that judges, by and large, not only look forward to the brief but actually *need* an effective brief. The brief is an essential part of judicial decision making.

I believe judges receive better briefs if they let lawyers know that they need the brief and may indeed rely upon it. I think it is counterproductive to state that briefs are poor and oral arguments are useless. If lawyers believe that briefs are ignored and not relied upon, and that oral arguments are useless, why should lawyers spend time and effort preparing them? At every opportunity I emphasize that I look forward to receiving counsel's brief. I hope that the brief will be helpful, and look forward to the oral argument because the court may have some important questions that it may wish to ask that may not have been treated in the brief.

Is the quality of oral argument going up or down?

Quality to me has to be equated with the word *helpfulness*. I believe that a brief is as effective as it is helpful to the court in deciding the question presented. I regard oral argument as a supplement to the brief. Oral argument is helpful if counsel answers whatever questions the court may ask that were not adequately treated in the brief. Some oral arguments have been most helpful, whereas others have neither helped nor harmed. I favor oral argument because it is counsel's opportunity personally to see and speak with the court. It also affords counsel the invaluable opportunity to answer whatever questions the court may wish to ask.

You've also lectured on appellate opinion writing. What's the state of that art today?

It is improving. As with briefs, we are aware of their importance, and consciously try to write better opinions. I have had the privilege of lecturing with Chief Judge Ruggero Aldisert, and other very fine judges, and believe that a great deal has been accomplished by showing that legal writing can be good literature. Surely legal writing not only can be good English but, indeed, must be good English. It must be clear, it must be accurate, and it must be as brief as the subject matter will permit. I am in favor of instruction in the opinion-writing process, because it also highlights the importance of the opinion in memorializing the law. Like other forms of art and literary composition, there is a definite form to the judicial opinion. There should be an introductory statement, a statement of the question presented, a statement of the pertinent facts, an indication of the contentions of the parties, a discussion of the application of the law to the facts, and a conclusion that flows logically from the discussion.

We take the judicial opinion for granted. A court or judge cannot simply declare, "judgment for the plaintiff, X dollars," or "judgment for the defendant." In the opinion one must explain why. In memorializing the law the judge must set forth reasons why the case was decided in the manner that it was. This is a distinctly Anglo-American contribution.

I lectured on opinion writing at a Federal Judicial Center program for newly appointed bankruptcy judges in September. I stressed that in opinion writing as in brief writing, a great deal of thought must be given to the question presented. In writing either a brief or an opinion, I would want to make sure that I knew what was the question presented. I would ask myself, Did I correctly answer the question presented, and did I give thought to the relief requested? Was the requested relief appropriate, and for what reason was it or was it not granted? We cannot forget that it is a judicial opinion that we are writing rather that a law review article or a monograph.

You were appointed by the Chief Justice to chair the Federal Judicial Center's Advisory Committee on Experimentation in the Law, which issued its report four years ago. Your Committee's report points out that there are dangers associated with inadequately justified experimentation, uncontrolled innovation, and failure to institute needed innovations. What steps have to be taken to ensure that experimentation or innovation does not sacrifice fairness?

Innovations must advance the cause of justice. In experimentation, disparate treatment of individuals must be reconciled with fundamental legal and ethical ideals. In order to avoid misleading results, it is essential that experiments be properly designed. The Committee report indicated the factors to be considered *before* a program of experimentation is undertaken. It suggests an analytical framework for an administrator to use experiments consistent with legal and ethical standards. In my opinion, the Committee made a valuable contribution in highlighting the ethical problems of program experimentations that deserve careful attention and sensitivity. ■

"Judges receive better briefs if they let lawyers know that they need the brief and may indeed rely upon it."

Court Representatives, Business Executives Meet to Improve Judicial Management in D.C.

A new program in the District of Columbia has already been beneficial to the two federal courts here and to the District's business world.

In what Chief Judge Aubrey E. Robinson, Jr. (D.D.C.), and District Clerk James F. Davey called a "first," the Greater Washington Board of Trade, the Council for Court Excellence, representatives of the federal and local courts, and executives from local industries met recently to plan and sponsor programs aimed at bringing together personnel from all those offices to reach a better understanding of the courts' work and how it affects the private sector. It is, declared Mr. Davey, "a link between the private and public sector. If we [the courts] do a better job, then the business climate is better."

The Council for Court Excellence served as the initial catalyst in bringing together court officials and private-industry executives. Representatives from both groups found that they had similar management concerns. Among the topics they discussed were the need to plan well into the future and to draft mission statements and the need for interagency staff meetings involving clerks' offices, U.S. attorneys' offices, and probation offices in the local and federal systems. Personnel issues were also discussed, and the plan is to develop motivation programs as well as a reward system. An attractive brochure that explains court procedures was suggested to recruit highly qualified candidates to apply for vacancies.

Chief Judge Robinson met with the groups to express his appreciation for their efforts—especially a seminar developed and sponsored by corporate planners—and told them that "the seminar was a rare opportunity to address issues sometimes overlooked in the day-to-day business of the courts and could not have been accomplished without [your] support. Your efforts will be greatly rewarded."

Later this month there will be a meeting of all those involved in this effort—numbering about 40—to review what has been accomplished by five project teams and to decide what remains to be done. ■

Insurance Open Season Begins

An open season to enroll in or change health insurance benefits will take place from Nov. 4 to Dec. 6, the AO has announced.

CONFERENCE, from page 1

clerks to collect fines levied under the Comprehensive Crime Control Act of 1984. That act now requires the Justice Department to collect the fines.

The expenses-reimbursement legislation endorsed by the Conference would allow judges assigned to other courts as visiting judges to receive actual expenses no matter how long a visit lasted. Visiting judges now receive actual expenses only if their stay is longer than 30 days; otherwise, they receive a fixed allowance that may not cover their hotel and meal expenses.

In other actions, the Conference—

• Approved more than 20 amendments to the Federal Rules of Appellate Procedure, which will now go to the Supreme Court. Many of the proposed changes are designed to make the rules' language gender neutral. Rule 30, as revised, would require each circuit court to establish a rule governing sanctions for appellate litigation brought in bad faith. A proposed change to rule 45 would allow courts to maintain computerized, as opposed to written, dockets.

• Endorsed legislation pending in Congress to authorize membership on the Judicial Conference for the Court of International Trade. The same legislation would allow that court to conduct an annual judicial conference, as the circuit courts do. ■

Request for New Bankruptcy Positions

The 47 new bankruptcy judgeships the Judicial Conference urged Congress to create would be distributed as shown below. (The Conference also authorized its Executive Committee to request several more bankruptcy judgeships by the end of this year, after deciding which districts they should be located in.)

3rd Cir.	D.N.J.	2
4th Cir.	D. Md.	1
	D.S.C.	1
	E.D. Va.	1
5th Cir.	N.D. Tex.	1
	S.D. Tex.	3
	W.D. Tex.	1
6th Cir.	W.D. Ky.	1[a]
	W.D. Mich.	1
	E.D. Tenn.	1
	W.D. Tenn.	1
7th Cir.	C.D. Ill.	1[b]
	N.D. Ill.	2
	N.D. Ind.	1
	E.D. Wis.	1
8th Cir.	E.D./W.D. Ark.	1
	N.D. Iowa	1
	S.D. Iowa	1
	D. Neb.	1
9th Cir.	C.D. Cal.	7
	E.D. Cal.	2
	N.D. Cal.	2
	S.D. Cal.	1
	D. Idaho	1
	D. Or.	1
	E.D. Wash.	1
	W.D. Wash.	1
10th Cir.	N.D. Okla.	1
	W.D. Okla.	1
	D. Utah	1
11th Cir.	M.D. Fla.	2
	N.D. Ga.	2
	S.D. Ga.	1

[a] To have concurrent jurisdiction in the Eastern District of Kentucky.
[b] To have concurrent jurisdiction in the Northern and Southern Districts of Illinois.

Office of Eighth Circuit Executive Changes Location

The Eight Circuit has moved its circuit executive's main office from St. Louis, Mo., to St. Paul, Minn.

The change will put the circuit executive's main office in the same city as the chief judge of the circuit.

Chief Judge Donald P. Lay, who announced the move, also announced that Lester Goodchild, the Circuit Executive since March 1980, resigned last month, and the work of the office will be temporarily supervised by June L. Boadwine, the Assistant Circuit Executive. Mr. Goodchild has become Assistant Circuit Executive in the Second Circuit.

Mail to the Eighth Circuit executive's office should now be sent to Ms. Boadwine at Box 75428, St. Paul, MN 55175. The phone numbers for that office are FTS or 612/725-7311.

The vacant circuit executive position will be advertised in the future, Judge Lay said. ■

PERSONNEL

Nominations

Nicholas Tsoucalas, Judge, Court of International Trade, Sept. 11
Laurence H. Silberman, U.S. Circuit Judge, D.C. Cir., Sept. 11
Paul N. Brown, U.S. District Judge, E.D. Tex., Sept. 11
Alan A. McDonald, U.S. District Judge, E.D. Wash., Sept. 11
Henry T. Wingate, U.S. District Judge, S.D. Miss., Sept. 11
Richard H. Battey, U.S. District Judge, D.S.D., Sept. 27
John A. Fuste, U.S. District Judge, D.P.R., Sept. 27
John S. Rhoades, Sr., U.S. District Judge, S.D. Cal., Sept. 27
Lyle E. Strom, U.S. District Judge, D. Neb., Sept. 27
Bobby R. Baldock, U.S. Circuit Judge, 10th Cir., Oct. 7
David R. Thompson, U.S. Circuit Judge, 9th Cir., Oct. 7
Glenn L. Archer, Jr., U.S. Circuit Judge, Fed. Cir., Oct. 16
James L. Buckley, U.S. Circuit Judge, Fed. Cir., Oct. 16
John T. Noonan, Jr., U.S. Circuit Judge, 9th Cir., Oct. 16
Edward R. Korman, U.S. District Judge, E.D.N.Y., Oct. 2
Robert E. Cowen, U.S. District Judge, D.N.J., Oct. 7
William J. Zloch, U.S. District Judge, S.D. Fla., Oct. 9
Patrick A. Conmy, U.S. District Judge, D.N.D., Oct. 16
Lynn N. Hughes, U.S. District Judge, S.D. Tex., Oct. 16
Albert I. Moon, Jr., U.S. District Judge, D. Hawaii, Oct. 16
Jane R. Roth, U.S. District Judge, D. Del., Oct. 16

Confirmations

Stephen H. Anderson, U.S. Circuit Judge, 10th Cir., Oct. 16
Ralph B. Guy, Jr., U.S. Circuit Judge, 6th Cir., Oct. 16
David A. Nelson, U.S. Circuit Judge, 6th Cir., Oct. 16
James L. Ryan, U.S. Circuit Judge, 6th Cir., Oct. 16
Paul N. Brown, U.S. District Judge, E.D. Tex., Oct. 16
Glen H. Davidson, U.S. District Judge, N.D. Miss., Oct. 16
Brian B. Duff, U.S. District Judge, N.D. Ill., Oct. 16
Ferdinand F. Fernandez, U.S. District Judge, C.D. Cal., Oct. 16
Edmund V. Ludwig, U.S. District Judge, E.D. Pa., Oct. 16
Robert B. Maloney, U.S. District Judge, N.D. Tex., Oct. 16
Alan A. McDonald, U.S. District Judge, E.D. Wash., Oct. 16
Alan H. Nevas, U.S. District Judge, D. Conn., Oct. 16
David Sam, U.S. District Judge, D. Utah, Oct. 16
David B. Sentelle, U.S. District Judge, W.D.N.C., Oct. 16
Stephen V. Wilson, U.S. District Judge, C.D. Cal., Oct. 16
Henry T. Wingate, U.S. District Judge, S.D. Miss., Oct. 16

Appointment

Louis L. Stanton, U.S. District Judge, S.D.N.Y., Sept. 10

FEES, from page 3

would be payable even if the litigation were settled quickly—removing the incentive under the lodestar method to reject settlement offers before many hours of legal time have been expended.

The task force also recommended the appointment of a fee representative in cases involving the enforcement of statutory rights in which little or no money is at issue. The contingent fee would be awarded if the litigation were settled. But if the case went to trial, the fee would be set by the lodestar method, with the following changes:

- Developing standardized districtwide hourly rates instead of litigating the worth of attorneys' time on a case-by-case basis.
- Requiring projections of the number of hours needed for a case at early pretrial conferences.
- Modifying the multiplier formula to reflect the risk, the outcome, the petitioning attorneys' contribution to a quick or protracted resolution, and the delay in receiving the fee.

Statutory-fee cases that would create a large common fund would be treated like the other common-fund cases, with the agreed-upon fee governing even if the case went to trial.

The task force also suggested ways the court can ensure that plaintiffs' attorneys can agree on settlements and fees with defendants while minimizing the risk that the agreement will inflate fees at the expense of the settlement funds.

The report is being published in the October 14 advance sheet issue of *Federal Reporter 2d* (No. 43), at yellow pages 1-49, and in the November advance sheet issue of *Federal Rules Decisions*. Copies can also be obtained from William K. Slate, Circuit Executive for the Third Circuit, 20716 U.S. Courthouse, Philadelphia, PA 19106. ■

CALENDAR

Nov. 3–7 First Circuit Judicial Conference

Nov. 6–8 Regional Seminar for Bankruptcy Judges

Nov. 7–8 Workshop for Judges of the Second and Third Circuits

Nov. 13–15 Workshop for Judges of the Fifth Circuit

Nov. 18–20 Workshop for Judges of the Eighth and Tenth Circuits

Nov. 18–22 Workshops for Clerks and Chief Deputy Clerks of Circuit and National Courts of Appeals

Nov. 20–21 Judicial Conference Advisory Committee on Civil Rules

Nov. 21–22 Seminar for Circuit Executives

Dec. 2–4 Juror Management Workshop

Positions Available

Clerk, Tenth Circuit Court of Appeals, Denver, Colorado. Salary $52,202 $68,700. Requirements include 10 years' administrative experience (law practice may be substituted for general administrative experience; college education and degrees in public business, judicial administration, and law may be substituted partially for general administrative experience). Send resume (original and three copies) indicating position applied for, by Nov. 15, to Emory G. Hatcher, Circuit Executive, C-428 U.S. Courthouse, Denver, CO 80294, 303/844-4118 or FTS/564-4118.

• • •

Clerk, U.S. Bankruptcy Court, Eastern District of Texas. Salary to $44,430, JSP-14. Manages administrative activities of the clerk's office and oversees performance of the statutory duties of that office. Applicants must have a minimum of 10 years of progressively responsible administrative or appropriate professional experience in public service or business and a full understanding of the organizational and procedural aspects of court management.

Deputy Clerk—Estate Administration. Salary to $37,599, JSP-13. Responsible for all matters related to managing trustees and trustee-related activities. Must be a college graduate with a degree in law, business, court administration, or similar discipline and must have a minimum of two years of progressively responsible management or legal experience.

For both positions, submit resume and salary history, by Nov. 12, to Honorable Houston Abel, Judge, U.S. Bankruptcy Court, P.O. Box 1118, Tyler, TX 75710, FTS/719-6038 or 211 597-8432

EQUAL OPPORTUNITY EMPLOYERS

Above top, Judge Morey L. Sear (E.D. La.), Chairman of the recent FJC Seminar for Newly Appointed Bankruptcy Judges, introduces seminar lecturer George M. Treister, a member of the California Bar and of the faculty of the University of Southern California Law Center. At the seminar, l. to r., are Judges Rosemary Gambardella (D.N.J.), R. Clifford Fulford (N.D. Ala.), A. Jay Cristol (S.D. Fla.), Stacey W. Cotton (N.D. Ga.), and Francis Conrad (D. Vt.).

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

Cannon, Mark W., and David M. O'Brien. *Views from the Bench.* Chatham House, 1985.

Covington, Margaret. "Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation." 16 *St. Mary's Law Journal* 575 (1985).

Dimond, Paul R. "Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review." 12 *Hastings Constitutional Law Quarterly* 201 (1985).

√ Edwards, Harry T. "Do Lawyers Still Make a Difference?" Speech to the State Bar of Michigan, Sept. 11, 1985.

√ Feinberg, Wilfred. "Remarks at the Judicial Conference of the Second Circuit." Sept. 6, 1985.

Markey, Howard T. "Ethics Today: Young Lawyers and Old Wine." 12 *Barrister* 55 (Summer 1985).

Mikva, Abner J., "Judge Picking." 10 *District Lawyer* 36 (Sept. 1985).

Schwartz, Bernard. "Earl Warren as a Judge." 12 *Hastings Constitutional Law Quarterly* 179 (1985).

Sessions, William S. "Attorney Competency in Federal Courts: The Second Milestone and the Challenge Ahead." 32 *Federal Bar News & Journal* 285 (1985).

Stevens, John Paul. "Judicial Restraint." 22 *San Diego Law Review* 437 (1985).

Stevens, John Paul. "Professor Edward H. Levi." 52 *University of Chicago Law Review* 290 (1985).

Torruella, Juan R. "The Supreme Court and Puerto Rico." University of Puerto Rico Press, 1985.

Trangsrud, Roger H. "Joinder Alternatives in Mass Tort Litigation." 70 *Cornell Law Review* 779 (1985).

Grand Jurors to See New Orientation Film

At its last meeting the Judicial Conference encouraged district court judges to use an orientation film prepared especially for grand jurors. The one-half-hour film is designed to familiarize grand jurors with the federal court system and their responsibilities as part of the system.

Entitled *The Federal Grand Jury: The People's Panel*, the film is narrated by John Houseman and looks at the grand jurors' role largely through the eyes of a woman who is summoned to serve.

The film presents a mock grand jury session. The prosecutor explains the allowable use of hearsay in such proceedings and the need for the use of immunity in some situations—including one presented in this mock hearing. The grand jurors eventually decide to indict one of two suspects in a bank robbery, but decline to indict the other one because of insufficient evidence. The foreperson, who has served on a previous grand jury, explains to the other jurors that if the prosecution can find more evidence, the suspect may be indicted later.

Orders for the film should be placed directly with the vendor listed below. Invoices may be paid from each court's consumable-supply allocation. Further questions can be referred to the AO's Office of General Counsel (FTS or 202/633-6127).

Norman Carpenter
MGM Laboratories
10202 W. Washington Blvd.
Culver City, CA 90230

Outline of Cases on Bail Laws Available

The Office of General Counsel in the Administrative Office has prepared an outline of cases interpreting the Bail Reform Act of 1984. This outline has been reviewed by the Judicial Conference's Committee on the Administration of the Criminal Law.

The Committee members believe the outline could be helpful to federal judges and magistrates dealing with problems that arise under the new bail laws and have recommended that it be made available to the courts through the Center.

To obtain a copy, send a self-addressed label, preferably franked, to Inter-Judicial Affairs, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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DECEMBER 1985

Chief Judge Motley Describes Court, Career; Reflects on National Impact of Landmark Cases

Chief Judge Motley

When Chief Judge Constance Baker otley came to the U.S. District Court for Southern District of New York in 1966, brought to that court many years of expe-nce and an educational background that ll prepared her for the demands of the office. teen years later she became Chief Judge of t court, one of the largest in the federal rt system.

Service with the NAACP Legal Defense l Educational Fund during the early years her career identified her with civil rights es. In addition, she was a vital part of the team of lawyers who made legal history in 1954 with Brown v. Board of Education.

Chief Judge Motley earned a B.A. degree from New York University and an LL.B. from Columbia, and she has received six honorary degrees. Just this year the Judge received the first Distinguished Alumna Award from the Columbia Law Women's Association. When New York University conferred an honorary degree upon her in 1983, they commended her for "brilliant mastery of the law . . . and for beneficial influence upon the laws of the nation."

Chief Judge Motley is a former member of the New York State Senate and president of the borough of Manhattan; she has served on the Judicial Conference Committee on Records Disposition and currently is a member of the Committee on the Administration of the Bankruptcy System.

You've been Chief Judge of New York's southern district for three years now. What do you see as the district's strengths and weaknesses?

Well, I do not know that I can give you a laundry list for those two categories, but I think one of our great

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Civil, Criminal Rules Committees Invite Suggestions for Changes in Evidence Rules

At the last meeting of the Judicial Conference, a decision was made to ask the Advisory Committee on the Federal Rules of Criminal Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to work together to monitor the Federal Rules of Evidence and to recommend any changes in those rules. The reporter to the criminal rules committee, Professor Stephen A. Saltzburg, will serve as reporter for the group. The decision to rely upon a combined effort of the two existing committees means that the Advisory Committee on the Rules of Evidence, which was discharged after Congress approved the rules in 1975, will not be reactivated.

Any suggestions for changes to the Federal Rules of Evidence are welcome and will be considered in the same way that changes to the criminal and civil rules of procedure are considered, albeit by a combined effort of two committees. Suggestions for changes in the Rules of Evidence should be submitted to James E. Macklin, Jr., Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Wash., DC 20544.

DEC 4 1985
DIGEST

Attorney Admissions Committee Concludes Study

The report of the Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice, chaired by Chief Judge James Lawrence King (S.D. Fla.), was released following the fall meeting of the Judicial Conference. The committee made two major recommendations.

The first recommendation was that the Judicial Conference recommend to the federal courts their con-

See COMMITTEE, page 2

James Macklin Named AO Deputy Director

The Supreme Court has appointed James E. Macklin, Jr., to be Deputy Director of the Administrative Office

James E. Macklin, Jr.

of the U.S. Courts.

Mr. Macklin came to the Administrative Office in 1975 following a 31-year career in the U.S. Army. His Army career included service as Chief of the Criminal Law Division in the Office of the Judge Advocate General and Chairman of the Joint Service Committee on Military Justice.

See MACKLIN, page 8

Seventh Circuit Upholds Attorney Admission Rules

The Seventh Circuit has upheld a district court decision approving distinct federal standards for admission of attorneys to practice in the District Court for the Northern District of Illinois. Local rules of the court implementing such standards had been challenged by an attorney who contended that their effect in requiring him to meet new standards in order to maintain his previous admission to practice in the federal court constituted a denial of due process. The rules were promulgated in connection with the court's participation in the pilot program authorized by the Judicial Conference to implement, on an experimental basis, the recommendations of the Devitt Committee based upon its study of the competency of trial lawyers practicing in the federal courts.

The local rules of the Northern District of Illinois require attorneys to belong to the "trial bar" of the court before being allowed to appear alone either on behalf of a defendant in a criminal proceeding or during testimonial proceedings in a civil case. To become a member of the trial bar, an attorney is required to have four "qualifying units" of trial-type experience. At least two such units must be acquired by participating in actual trials.

The plaintiff, on behalf of a class of attorneys, alleged that the creation of the trial bar for this court in effect disbarred him, and that he was deprived of his due process right to notice and an opportunity to defend against such action.

The court of appeals held that the imposition of trial bar membership was a proper exercise of the district court's rule-making power rather than an adjudication of the plaintiff's competence as an attorney. Moreover, the plaintiff had received notice and an opportunity to comment, the court found, because the local bar committee charged with implementing some of the Devitt Committee's recommendations had published the proposed rules and invited attorney comment at an open meeting. ■

Conference at Yale Assesses Procedures, Weighs Judges' Options in Processing Cases

The National Conference on Litigation Management, held recently at the Yale Law School, was attended by approximately 150 people, including members of the federal judiciary, practicing lawyers, and academics. The conference attempted a critical evaluation of the present status and future prospects of civil litigation. One of its goals was to "initiate a fundamental reassessment of the procedural tools presently available to the federal judiciary," according to conference organizer E. Donald Elliott, Jr., Professor of Law at Yale Law School. Another aim of the conference was "to reduce the costs of litigation by improving the ability of federal judges to process major cases efficiently," Professor Elliott said. The conference was cosponsored by Yale Law School, the ABA Litigation Section, and the Center for Public Resources.

Among the topics included on the conference's agenda were the role of judges in settling cases, the summary jury trial, and the role of special masters. A series of workshops gave participants an opportunity to propose various settlement options and other responses to a hypothetical complaint filed by plaintiffs residing near a

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sideration of programs aimed at improving trial advocacy. The recommended programs are those that were originally suggested by the Devitt Committee and subsequently tested by the thirteen district courts that participated in the pilot program on attorney admissions authorized by the Conference in 1979. (The Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts, known as the Devitt Committee, was appointed by Chief Justice Burger in 1976, and reported to the Judicial Conference in 1979 that programs aimed at improving the state of advocacy in the federal courts were warranted.)

The pilot programs included federal practice bar examinations, trial experience requirements, peer review procedures, continuing legal education programs, and the implementation of student practice rules, although not every district court operating a pilot program utilized all of these program elements. The thirteen district courts that operated pilot programs were C.D. Cal., N.D. Cal., N.D. Fla., S.D. Fla., N.D. Ill., S.D. Iowa, D. Md., D. Mass., E.D. Mich., W.D. Mich., D.P.R., D.R.I., and W.D. Tex.

The implementation committee's second major recommendation was that the Judicial Conference assign to a committee responsibilities for receiving information from all district courts on programs aimed at improving federal trial advocacy, helping the courts share such information, and making any appropriate further proposals to the Conference.

Upon acceptance of the implementation committee's report by the Judicial Conference, the committee was discharged.

Judge A. Leon Higginbotham, Jr. (3rd Cir.), dissented from the committee's report, in response to which the committee filed an addendum. ■

THE THIRD BRANCH

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

Holiday Message from Chief Justice Warren E. Burger

As the close of this year approaches t is appropriate that we pause a while o reflect on the history made by the ederal judiciary during 1985, and I vant to personally thank all of you in he Judicial Branch who have contrib-ıted so much to our accomplish-nents.

This past year has brought us sig-ificant and important changes. It is ood to be able to report that the ederal judiciary adjusted to these hanges and met its obligations.

One of the biggest changes came vhen the Administrative Office real-zed a change in leadership with the ppointment of L. Ralph Mecham as ne new Director and James E. Mack-n, Jr., as the new Deputy Director. hey replace dedicated public mployees whose combined service o the federal judiciary totals over alf a century. The transition, thanks o everyone involved, was smooth nd efficiently executed.

When the Omnibus Crime Control ct was passed into law in 1984, the ıdicial Branch immediately took eps to assure compliance. This ork continued in 1985. I am proud the voluntary, dedicated action of l those involved in the process—dividuals who made certain that the diciary met its responsibilities. The dministrative Office, the Federal ıdicial Center, and the judges and ieir supporting personnel continue devote many hours of effort to sure that their tasks are carried out mandated by the Congress. An xample of this effort is the four-our, live satellite broadcast to 30 cit-ies in January 1985, which reached more than 2,200 personnel in 68 districts. This panel discussion was also videotaped and has since reached more than three times as many individuals.

The Chief Justice

Our cooperation with the newly established Sentencing Commission is another example of how the federal judiciary has met its obligations. It was my privilege to issue the oath of office to the seven who serve on this commission, including three federal judges, on October 29, and the Chairman of the commission, Judge William W. Wilkins, Jr., early on held meetings of the commission and set about the task he and the other commissioners face.

Our accomplishments have been supported by the effective use of modern technology. It is a splendid example of how the Administrative Office and the Federal Judicial Center, in close cooperation with the Judicial Conference of the United States, have been able to move forward efficiently and to reap the benefits of the computer age.

During the past year many judgeship vacancies have been filled and we have the assurance of the Attorney General that nominations to fill remaining vacancies will be made as expeditiously as possible. More than 60 new judges were afforded the opportunity to gather in Washington in January and October to attend seminars for newly appointed trial judges, and it was personally gratifying to learn of their keen interest and enthusiasm for their work. As for the appellate judges, last spring 17 new judges from the circuits gathered at the Center for an orientation seminar. In addition, I have appointed Judge Arlin Adams of the Third Circuit to be chairman of a committee to evaluate and assist in designing special programs that will be helpful to circuit judges. All of this bodes well for the future.

I would like to take this opportunity to thank each of you for your many contributions during the year. Mrs. Burger and I extend to all of you our sincere wishes for a happy holiday season and a productive and healthy 1986.

Sincerely,

Warren E. Burger

ONFERENCE, from page 2

zardous-waste disposal site.

More than 50 federal judges were attendance. The conference noted at 1985 marks the 50th anniver-ry of the Federal Rules of Civil ocedure.

Five scholarly papers were pro-ced for the conference. They clude Seventh Circuit Judge chard Posner's paper "The Summary Jury Trial: Some Cautionary Observations"; Professor Elliott's paper "Managerial Judging and the Evolution of Procedure"; U.S. Magistrate Wayne D. Brazil's analysis "Special Masters in Complex Cases: Expanding the Judiciary or Reshaping Adjudication?"; Yale Law Professor Peter H. Schuck's "The Role of Judges in Settling Cases: The Agent Orange Example"; and "Lessons from ADR," by Jethro K. Lieberman and James F. Henry, Vice President and President, respectively, of the Center for Public Resources.

Copies of the above-mentioned papers may be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed label, preferably franked (but do not send an envelope). ■

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strengths is that we have developed in this court a management system whereby all the judges participate in managing the court along with the Chief Judge. We meet regularly as a board of judges and vote on all policy matters. We have twenty-three committees (membership of which is selected by the Chief Judge), each headed by a judge (selected by the Chief Judge), which oversee one particular area of the court's business. For example, we have a committee on the probation department, the bankruptcy court, the clerk's office, the pro se litigation activity—so that the administrative work of this court, which is the largest federal trial court in the country, is shared by all the judges. The committee system has been in effect for many years and has served to give each judge a sense of community and collegiality.

I hate to confess to any weaknesses, but I do think that perhaps in the area of supporting personnel there is a great deal to be desired. I think that as the caseload for each judge has increased over the last twenty years, the manpower necessary to help us deal with that tremendous increase has not kept pace. So that would be a weakness, I would think, in our operation.

Where do you need more help?

In the clerk's office the position called courtroom deputy should be substantially upgraded, and a requirement for the position should be that that person be a law school graduate. That person would have the responsibility of taking full charge of the judge's calendar in the sense of not only calling up the lawyers on the telephone and saying "come in, the judge wants to see you" but telling the judge what the status of the case is and what the lawyers have failed to do since the last conference, for example. Now somebody trained as a lawyer would be able to do that with very little guidance from the judge, whereas if you have a high school graduate—and we have some excellent people who have gained a lot of experience—I think that they are not really able to grapple with some of these cases and tell the judge what the status is, what ought to be done next to get the lawyers moving. You always find an exception here and there, but I do think that courtroom position should be upgraded and that salary increased to what's necessary to get competent people.

Now the clerk's office is being automated, which would seem to suggest to me we need people who have training in automation and use of computers and more modern techniques. I don't know that we really have that. I think we have a terrible problem with our files. We don't seem to have enough people whose job it is to file things and to be able to retrieve those things from the file. That's a real weakness in our clerk's office. Judges complain every day to me how they send something to the clerk's office and then it can't be found—a recent order usually, a recent opinion—because it's away somewhere being photostated or it's mislaid in the clerk's office. And that just suggests a lack of manpower. Now when you speak to the clerk about it he will tell you that we can't hire people in the clerk's office with sufficient competence to keep up with the files because the salary does not look inviting to anybody with any competence. So it seems to me that we have to look at these job classifications more realistically and bring them up to scale—particularly to match the scale of the New York labor market. In other parts of the country you may be able to get skilled people for much less money because the cost of living is much lower. We have, apparently, one standard that applies throughout the country, which renders us weak in that respect. We can't hire people with the skills that are now needed in the clerk's office to take charge of masses of documents and cases. It's a continuing problem that I say has never really been dealt with.

"We have developed in this court a management system whereby all the judges participate in managing the court."

We know there are judges who are here late at night trying to keep current. You recently wrote to New York's two senators urging they help break the logjam that has delayed judicial appointments. What kind of results did that produce?

Well, it produced the results that the two judges suggested by Senator D'Amato—Mr. Stanton and Mr. Walker—have now been nominated by the President. Their names were submitted by Senator D'Amato several months ago and it's taken all this time to get them nominated. Now, at the moment, we are down five judges, including the two vacancies which Mr. Stanton and Mr. Walker will fill. We have a vacancy created by the death of Judge Werker last year. Here it is more than a year later and it's still unfilled. We have a new vacancy created by the recent appointment of Judge Sofaer to be Legal Adviser to the State Department, and Judge Gagliardi stepped down in July as an active judge and became a senior judge and that created our fifth vacancy. But as I've indicated, Judge Werker died more than a year ago and nobody has even been named for that. One of the vacancies to be filled by Mr. Stanton and Mr. Walker goes back to when Judge Lasker or Judge Pollack took senior status in September of 1983. So you see it's more than a year and a half or so that that position has been vacant. Now that means that the work of five judges is then redistributed among the remaining 22 judges.

If the court were at its full authorized strength, could it cope with the current caseload?

Well, certainly, I think much better than we are now. Yes, I do think so, although we have been authorized to have another position—that is, we've

een authorized to have 28 judges ecause of our caseload. We have, I hink it is, 400 weighted cases per udge, which entitles us to another udge. But here again, Congress has et to authorize the position and that ould probably be another couple of ears. They just authorized posi-ons, as you know, last October. We ere not included in that judgeship ll. So even if we had all of our vacan-es filled, we would still have the roblem to deal with that we all just ave too many cases to really cut own on our long working hours.

What's the consequence of those seloads? Does the quality of the dges' work suffer?

Well, I think so. It would be bound suffer. That is, you can't devote as uch time and thought and reflec-on as many of these matters quire. We have to rely more heavily our law clerks to do the research. e have to rely on them to draft inions. We have to help out in the urtroom with respect to the status cases, that is, getting cases moving ong where lawyers aren't doing ything. And that goes back to what said about the courtroom deputy ing upgraded. So that seems to be e situation there.

Your court has recently formed a mmittee on discovery sanctions. Is at working, and if it works, does it e some judge time?

Yes, that committee has finally orted. We really haven't taken any astic action with respect to that. I nk the existence of the new rule elf permitting such sanctions has d its effect. And, of course, you're ays going to have problems with yers in that direction. But I think e most helpful thing has been the t that the rule does exist which rmits the judge to impose ctions.

'd like to talk a minute not just ut the number of cases coming o your court—the federal system's gest trial court—but about the es of cases you see. New York, of rse, is the nation's capital of com-rce, and I assume your caseload lects that.

Yes. I think that we have probably a disproportionate number of commercial cases in this court because of our location here in the financial center of the country. It makes this court unique, perhaps, in that respect, although Washington probably has a similar load—although probably involving more governmental agencies—whereas we have the major American corporations that are all represented by Wall Street lawyers, so that we do have the heavy traffic in that kind of litigation. Major cases.

And don't you also get some agency cases—from the Federal Trade Commission and Securities and Exchange Commission, for example?

Oh, yes, we do. I was simply saying that Washington would be another busy court in terms of probably commercial-type cases arising out of agency activity. But we certainly get our share right here because there's a regional SEC office. The agency is going after many major corporations located here.

When you get one of those cases—an agency case or a commercial case with a phalanx of lawyers on either side, that's equal to what—maybe half a dozen drug cases—in terms of judge effort?

Oh no, those can be far beyond that. Usually those cases take several years before they are finally resolved, and a judge could try a dozen drug cases in a year.

Do you think that there's going to be more work for the court as a result of last year's Comprehensive Crime Control Act?

Oh yes, many, many problems are cropping up. I know that in this district our caseload on the criminal side has been increased something like 24 percent in the last year alone, and that is presenting us with serious problems because they are unusual cases in the sense that they involve numerous defendants. Twenty or thirty defendants and a hundred counts. We have a case now, for example, that Judge Sofaer had been working on—a case with something like 24 defendants in which the government plans to prove 24 murders. There are similar cases that have recently been filed which are unprecedented in the number of defendants and the number of charges involved and the time it will take for us to actually try and dispose of those cases. So we do have on the criminal side really serious problems in the sense that each of us also already has what we call two Wheel C cases. Those are two cases each of which will take at least three weeks to try, and as I've said we've got some now that are in the category of four or five months to try.

"As I travel about the country now even I am amazed at the progress which has been made."

Does the clerk make the determination when those cases come in as to which ones go in Wheel C?

The U.S. Attorney, by telling us how long it would take to try a case, makes the initial designation. He will say, "Well, this case will take four months to try" (or four weeks to try) and this is a Wheel C case.

Going back to civil cases—many judges have urged abolishing diversity jurisdiction to cut back the federal courts' caseload. How do you feel about that?

Yes, I favor that. I do think that that would make a dent in our caseload. I think the statistics show that is about 20 percent of our caseload. That would be a substantial reduction right there and I certainly think that that should be done. Of course, the state courts are probably in worse condition and that's probably the drawback. The country as a whole probably would not be better off, but the federal judicial system would experience an easing in its caseload, I

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believe, if we were to lose our diversity jurisdiction.

Many New York litigators look for any possible way to get into federal court, to get a much faster trial and one judge all the way through.

Yes. Well, I think the single-judge calendar system is the greatest invention since the wheel. Without that this place wouldn't move at all. And each judge, of course, guards his reputation jealously and would like to see himself referred to as a competent judge, and having an individual calendar system is the incentive for everybody to keep working so that he is not the last man on the totem pole.

You talk about keeping the court moving. Let's talk about your role as the court's administrator. What do you do to help your colleagues cope with their workload? What can you do?

Well, basically our problems result from the fact that a judge is tied up in a long trial and he has to meet speedy trial requirements with respect to these other criminal cases. He would be tied up in a long civil trial, as Judge Sofaer was with the Ariel Sharon libel suit and as Judge Leval was with the Westmoreland case. Both of those judges were in court for weeks and weeks and that meant they couldn't try criminal cases. And so we had to call on senior judges whenever they found that the Speedy Trial Act was about to run and ask a senior judge if he wouldn't like to try the case. Fortunately, so far we've usually been able to get a senior judge, because we have about 12 senior judges, about eight of whom are active. So I can always in an emergency like that call on a senior judge, and thank goodness they are around because they do save the day, so to speak, in that respect. But in addition we have the problem of reassigning a major case if a judge already has two about to be tried. The assignment committee, of which I am chairman, then has to either decide to put it back in the wheel if a senior judge can't be found, or just ask some other judge if he could take that case at that particular time. Since everybody is busy that's next to impossible, so we usually just put it back in the wheel and some lucky judge gets another big case.

Is it easier for a senior judge to pick up a criminal case just before trial than a civil case because there's less judge involvement before the trial itself?

Yes, I think so. But there's a pretrial order limiting the issues and indicating the witnesses and exhibits in a civil case, so it's not that hard to pick up on a ready civil trial.

You do all your administrative work while you're carrying a full caseload?

> **"The only way I know how old I am is when I meet young blacks who never heard of *Brown*."**

Oh yes, and that's because I am the first Chief Judge to have a District Executive, whose job it is to actually see to and do the administrative work in many areas, particularly our relations with the Administrative Office. We get memos daily from the Administrative Office requesting that this, that, or the other be done or requesting certain information and requiring that certain notices be given to judges. Well, all that is wholly administrative—it has nothing to do with judicial function—and so it's very important in a court of this size to have an official who is competent to deal with these administrative matters. And then, of course, we have our relations with the public and that kind of thing, which the executive also deals with. And then the executive in addition to helping me as Chief Judge acts as secretary to all these committees. The judge who is chairman of a committee can't really devote a lot of time to simply sending out committee notices and making sure arrangements are made for the meeting, getting the agenda together, accepting excuses from judges who can't attend and so forth, so there's a tremendous amount of work for the District Executive who's in charge. He also runs our purchasing department, our inventory, and we have other functions—we have educational programs for lawyers who are on the pro bono panel, we have educational programs for lawyers on our Criminal Justice Act panel that he supervises—he gets the professors in from the law schools to conduct those programs—and we also have other in-house training programs for employees, and so forth. And it's a tremendous job in terms of the number of duties and responsibilities which have attached to that new position.

Can we talk about you as a judge rather than as an administrator? You've been on the bench almost two decades. What changes have you seen in the court? What trends, what operating shifts?

Well, the major one is the increase in litigation, which everyone is aware of. I think that in the last 20 years that I've been here the caseload in the federal system as a whole has increased over 200 percent. Whenever I go out to speak somewhere I always mention that, and I think that a lot of our problems stem from the fact that we have become a society of litigators, with more and more people looking to the federal courts as a place to go to resolve all disputes in society. We're not just getting commercial litigation, which was the usual fare here 20 years ago, but many major social issues which seem to resist resolution by the President or the Congress or by the governor or some state agency and end up in the federal court, so that the federal courts have really moved to center stage in this society in a way that not many people contemplated, say, four decades ago, particularly when people hardly knew that we had a Supreme Court except they knew it was in Washington. But now everyone is aware of

he significant role that the Court plays in our society. Either you hate he Court for its decisions or you love t, because these are very controversial issues in many respects. A couple of decisions came down recently in he area of freedom of religion—highly controversial—and that kind of case has, in the last two decades, occupied the time of federal judges considerably. And so the third branch has come into its own, so to speak. We have not always been prominent in he history of the country but now ve are, and I think that's a good thing ecause we profess to be a society overned by law and this reflects it. That is, people do still reflect the fact, y their activities, that the court is he place to go, and if you look at it, as Anthony Lewis of the *New York Times* aid, the court is still the only place where a citizen can go where the udge has to hear his case. No matter ow frivolous the case, the judge an't throw it in a wastebasket. He as to hear it and dispose of it. Whereas if you go to Washington you nay or may not get in to see your ongressman or your senator and ou're certainly not going to get in to ee the President unless you are eally special. So anybody can walk in he front door here and file a petition nd the judge will pass on it. And I hink the citizens of this country are ecoming aware of that. That is, the ght to redress our grievances goes ow to the court in the main.

Before you went on the bench you ere in the forefront of using the ourts for social ends, a relatively ew trend, as you say, and a trend hat you were part of making. Are eople who are doing the kind of gal work you were doing more nvolved in their cases and closer to heir clients than a commercial litator is? Does that make it tougher o take the bench—is it tougher to et to a state of judicial neutrality uickly?

Well, of course, the issues that I as involved in 20 or 30 years ago ave been largely resolved. I was volved in the fight to level the legal barriers to integration and that issue, as far as the law is concerned, is resolved. What is happening now, of course, is more and more cases stemming from more recent legislation enacted by the Congress in 1964—fair-employment-practices cases that fill the courts and controversies involving affirmative action and quotas, which is a more advanced stage of the kind of thing that I was doing. But I, along with Thurgood Marshall and Robert Carter, who is also a judge of this court, and others were kind of pioneers in this whole area of going to the federal court to enforce constitutional rights and when we were out there we were the only ones. And since then the whole area has grown tremendously, so that now public-interest law is a major discipline in our jurisprudence.

"I think the greatest change in the legal profession in the last 30 years has been the influx of women."

Some of those cases that you and Justice Marshall and others working with the NAACP Legal Defense Fund handled made history. What kind of feeling does it give you as a lawyer when you are on the prevailing side in a case like *Brown v. Board of Education*?

Well, naturally you would have a great feeling of accomplishment, not only personally but you know that as far as the country is concerned you have been able to contribute to the development of this nation. I think that perhaps we don't make as much of the fact that we have used the law to resolve major social problems as we should. I think other countries could learn a great deal from us, for example, South Africa. They have a similar kind of race problem. If they would look at the way we resolved a lot of it, by letting the courts handle many of these problems which the politicians find too hot to handle, well then they would probably be able to resolve some of their own problems. But we don't as a whole view that as a significant thing. In time, I think, history will record as a great achievement in American society that we were able to resolve this very difficult problem of race relations through peaceful means. But, as I say, I think that as a whole we as a nation are not now making as much of that as we should.

What's happened to some of the people you've represented in these historic cases?

I've heard from James Meredith off and on. He's now living in Cincinnati. Harvey Gant, who was another client of mine, is now the Mayor of Charlotte, N.C. I got him into Clemson College in 1961. I was recently in New Orleans and I saw Mayor Ernest Morial. I worked on the Louisiana State University case and he was the first—one of the first—black graduates of the law school there. I see a lot of the lawyers at the National Bar Association meetings. That's an organization of black lawyers in the country that I worked with around the South. Several of them have become federal judges, like Matthew Perry in South Carolina. And I see a lot of the lawyers with whom I worked, and as I travel around the country now even I am amazed at the progress which has been made, especially when you talk to young blacks who never experienced segregation, and hear their expressions of amazement that "Jim Crow" railroad cars existed in the past, for example. The only way I know how old I am is when I meet young blacks who never heard of *Brown*. Then I know I'm 65 or near it. But otherwise I have no sense, really, that it's been 30 years since *Brown*. You can't—time has no depth, so to speak. You can't feel the weight of it, and you feel as young as you did 30 years ago, but you really aren't.

If there were one change you could make in the federal judiciary, what would it be?

See MOTLEY, page 8

MOTLEY, from page 7

Well, I think I would push for more women to be federal judges. It seems to me that woman judges reflect a major change in the federal system. When I came on in 1966 I think there were only five woman federal judges in the country. President Carter appointed about 45 woman judges and that has been a significant advance for woman lawyers. I think that trend should continue because women are the majority group in our society (although everybody calls them members of a minority group), and I think that I would continue, if it were within my power, but of course it is not, to appoint more women. I think the greatest change in the legal profession in the last 30 years has been the influx of women, which I think will greatly strengthen and revitalize the profession. This will be a different country in the 21st century. One of the significant changes will be the number of women who are leaders in this society. I think the federal courts should not be out of step with the times. ■

The most important . . . dissatisfaction with all law . . . is to be found in the necessarily mechanical operation of legal rules.

— Roscoe Pound (1906)

CALENDAR

Dec. 2-4 Juror Management Workshop

Dec. 9-10 Judicial Conference Subcommittee on Judicial Statistics

Dec. 9-10 Judicial Conference Subcommittee on Federal Jurisdiction

Dec. 9-10 Judicial Conference Subcommittee on Federal-State Relations

Dec. 11-13 Judicial Conference Subcommittee on Judicial Improvements

Dec. 11-13 Judicial Conference Subcommittee on Supporting Personnel

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

√Aldisert, Ruggero J. "State of the Circuit Address 1985." Third Circuit Judicial Conference, Oct. 7, 1985.

American Bar Association. "Appellate Litigation Skills Training—The Role of the Law Schools." Report and recommendations of the Committee on Appellate Skills Training. 1985.

√Brennan, William J., Jr. "The Constitution of the United States: Contemporary Ratification." Georgetown University, Oct. 12, 1985.

Burger, Warren E. "The Need for Change in Prisons and the Correctional System." 38 *Arkansas Law Review* 711 (1985).

Eble, Timothy E. "Effective Appellate Practice in the Sixth Circuit." 16 *University of Toledo Law Review* 643 (1985).

Engelmayer, Seldon, and Robert Wagman. *Lord's Justice.* Doubleday, 1985.

Forrester, Ray. "Truth in Judging: Supreme Court Opinions as Legislative Drafting." 38 *Vanderbilt Law Review* 463 (1985).

Gerhardt, Michael J., and Robert J. Martineau, Jr. "Reflections on Appellate Practice in the Sixth Circuit." 16 *University of Toledo Law Review* 667 (1985).

Goldberg, Stephen, Eric Green, and Frank Sander. *Dispute Resolution.* Little, Brown, 1985.

Haskins, George L. "Prejudice and Promise in the Early Years of the Federal Judiciary." 37 *Maine Law Review* 301 (1985).

Lambros, Thomas D., "The Judge's Role in Fostering Voluntary Settlements." 29 *Villanova Law Review* 1363 (1984).

√Levin, A. Leo, and Denise D. Colliers. "Containing the Cost of Litigation." 37 *Rutgers Law Review* 219 (1985).

Lyons, David. "Formal Justice and Judicial Precedent." 38 *Vanderbilt Law Review* 495 (1985).

Martin, Boyce F., Jr. "The Flood of the Present: Congressional Inaction and Judicial Reaction." 16 *University of Toledo Law Review* 619 (1985).

Martineau, Robert J., Jr. "Practice in the Sixth Circuit: Oral Argument and Decisions from the Bench." 16 *University of Toledo Law Review* 655 (1985).

O'Connor, Sandra D. "Introduction: Achievements of Women in the Legal Profession." 57 *New York State Bar Journal* 8 (Oct. 1985).

Oliver, Solomon, Jr. "Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent." 16 *University of Toledo Law Review* 667 (1985).

Peckham, Robert F. "A Judicial Response to the Costs of Litigation: Case Management, Two-Stage Discovery Planning, and Alternative Dispute Resolution." 37 *Rutgers Law Review* 253 (1985).

Rehnquist, William H. "Presidential Appointments to the Supreme Court." 2 *Constitutional Commentary* 319 (1985).

√Rehnquist, William H. Remarks at the University of Wyoming, Oct. 25, 1985.

Render, Edwin R. "On Unpublished Opinions." 73 *Kentucky Law Journal* 145 (1984-85).

Shimomura, Floyd D. "The History of Claims Against the United States: The Evolution From a Legislative Toward a Judicial Model of Payment." 45 *Louisiana Law Review* 625 (1985).

Stevens, John Paul. "Legal Questions in Perspective." 13 *Florida State University Law Review* 1 (1985).

√Stevens, John Paul. Address to the Federal Bar Association, Chicago, Ill., Oct. 23, 1985.

"Symposium: Reducing the Costs of Litigation." 37 *Rutgers Law Review* No. 2 (1985).

Tribe, Laurence H. "What Difference Can a Justice or Two Make?" 71 *American Bar Association Journal* 60 (Sept. 1985).

Whitebread, Charles H. "The Burger Court's Counter-Revolution in Criminal Procedures." 24 *Washburn Law Journal* 471 (1985).

Position Available

Circuit Librarian, U.S. Court of Appeals for the Fourth Circuit (Richmond, Va.). Salary from $26,381 to $44,430. Requires accredited M.L.S. and J.D.; significant administrative experience; and knowledge of WESTLAW, LEXIS, and OCLC. Responsible for supervision of circuit and three branch libraries. Position open Mar. 1, 1986. To apply, send resume by Dec. 31, 1985, to Samuel W. Phillips, Circuit Executive, U.S. Court of Appeals, P.O. Box 6-G, Richmond, VA 23214.

EQUAL OPPORTUNITY EMPLOYER

MACKLIN, from page 1

At the AO, Mr. Macklin has served as Chief of the Criminal Justice Act Division, as Assistant Director for Plans and Program Management, and then as Executive Assistant Director. He has been a staff member to the Judicial Conference of the United States and its Committee on Court Administration, and he is also Secretary to the Committee on Rules of Practice and Procedure.

The new Deputy Director is a graduate of the U.S. Military Academy at West Point and Columbia University Law School. ■

1985 Circuit Judicial Conferences Concluded

In delivering his annual report to the Second Circuit Judicial Conference, Chief Judge Wilfred Feinberg praised the judges and their staffs for disposing of cases in spite of heavy filings and, in some courts, judgeship vacancies.

At the outset, the Chief Judge reminded the audience that additional judgeships are not the complete answer to their heavy caseloads, and he urged consideration of other methods of dispute resolution. He especially commended for consideration expanded use of arbitration. He also reported on new programs already started in the Southern and Eastern Districts of New York.

In the Southern District of New York there is a pilot project that calls for referral of cases to arbitration. Under this program, judges order parties to confer with the American Arbitration Association "about the possibility of resolving a dispute through arbitration or some other process" (such as mediation). Parties to the litigation are still free to call for trial. If they do decide to submit to arbitration, they must also execute a stipulation that advises the court that they voluntarily agree to dismissal of their action with prejudice.

The Eastern District of New York will also be starting a program for court-ordered arbitration. After discovery, each party to the litigation in a civil case will go before a panel of three paid arbitrators to present his or her version of the case. Up to 30 days after the decision from the arbitrators, either one of the parties has the right to request a trial de novo, but with this right comes the requirement that the party making the request pay the arbitrators' fees.

(For comments made by Chief Justice Burger at a joint meeting of the American Arbitration Association and the Minnesota State Bar Association last August, see *The Third Branch*, Oct. 1985, p. 1.)

* * *

Puerto Rico was this year's site for the First Circuit Judicial Conference. Chief Judge Levin H. Campbell presided and on behalf of the First Circuit accepted a warm welcome extended by both the Governor of Puerto Rico, Rafael Hernandez Colon, and the Mayor of San Juan, Baltasar Corrado del Rio.

The program included a timely subject—the Omnibus Crime Control Act—with emphasis on the work of the newly constituted Sentencing Commission. Four attorneys who practice in the Commonwealth of Puerto Rico conducted a panel discussion on the authority of the courts to impose sanctions.

FBI Director William Webster gave an informative presentation on the operation of the Bureau and how it handles some very sensitive matters—including issues that the federal judiciary sometimes encounters.

* * *

At the Third Circuit Judicial Conference in October, Chief Judge Ruggero Aldisert's "1985 State of the Circuit" address was read for him, since Chief Judge Aldisert was unable to attend. Though the address deals with the business of the circuit, it is also a scholarly dissertation on such matters as opinion writing and a critical look at how both lawyers and judges are using citations to cases to justify what they would have be a precedent. Still another criticism is directed to Congress, with Chief Judge Aldisert's conclusion that "we are in the midst of a congressional law explosion and a tournament to see what agency can proliferate the most regulations." He observed that "at least 100 bills to expand federal jurisdiction are proposed each year. This legislative and agency blast fattens the body of law, and adds more structures . . . to the house of the law."

Distributed at the conference was the "1985 Annual Report and Directory," prepared not only as a report but as a pamphlet that Chief Judge Aldisert and Circuit Executive William Slate designed for the assistance of the bar and public as well as the judiciary.

(For a related story on a Third Circuit task force's report on attorneys' fees, see *The Third Branch*, Nov. 1985, p. 3.)

* * *

Chief Judge Donald P. Lay presided at the Eighth Circuit's Judicial Conference, held this year in Little Rock, Ark., and released a 380-page report on the business of the circuit.

Judge Lay noted that the Eighth Circuit has kept one of the most current caseloads in the country, even though since 1979 the circuit has had the greatest percentage increase in filings in the nation. Going back to 1977 and comparing that year's filings with current figures shows an 82.7 percent increase in filings.

Judge Lay also referred to the circuit's preargument conference program and said it continues to be a significant factor in the reduction of cases. Of the 284 cases in the program during the calendar year 1984, 71 resulted in settlements and 42 were dismissed.

In the bankruptcy courts, there was a dramatic increase in filings of 26 percent, while nationally there was an average 1 percent increase. The District of Minnesota recorded the largest number of petition filings. ■

FJC Releases Paper on Videotaped Hearings

The Center has released a staff paper, *Assessment of Videotaped Bankruptcy Discharge Hearings in the U.S. Bankruptcy Court for the Western District of Pennsylvania.* The paper discusses this court's use of videotape equipment in 1984. The videotaped presentation was used in place of a judge's live recitation to impart to debtors the standardized portion of the information which is a part of the hearing. The 6-page paper concludes that "the use of a videotape can be recommended as a means of both conserving judge time and enhancing the value of the discharge hearing to the debtor."

FJC Report on Unpublished Dispositions Available

The Center has published *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals*, by Donna Stienstra of the Center's Research Division.

The paper presents a detailed description, in both tabular and narrative form, of the appellate courts' rules and practices with regard to distribution and citation of unpublished dispositions, including data on the number and types of unpublished dispositions in statistical years 1981-1984.

This paper also includes a history of the debate over limited publication of appellate decisions and a brief analysis of the issue of equitable access to unpublished dispositions, concluding that any combination of restrictions or freedoms with regard to distribution or citation of such dispositions leads to problems for either the courts or the bar.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but do not send an envelope).

PERSONNEL

Nominations

James H. Buckley, U.S. Circuit Judge, D.C. Circuit, Oct. 16 (incorrectly listed as Fed. Cir. in November issue)

Alan B. Johnson, U.S. District Judge, D. Wyo., Oct. 22

Frank X. Altimari, U.S. Circuit Judge, 2nd Cir., Oct. 23

Morris S. Arnold, U.S. District Judge, W.D. Ark., Oct. 23

Garrett E. Brown, Jr., U.S. District Judge, D.N.J., Oct. 23

Robert L. Miller, U.S. District Judge, N.D. Ind., Oct. 23

Jefferson B. Sessions III, U.S. District Judge, S.D. Ala., Oct. 23

Sidney A. Fitzwater, U.S. District Judge, N.D. Tex., Oct. 29

Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Oct. 29

Deanell R. Tacha, U.S. Circuit Judge, 10th Cir., Oct. 31

Harry D. Leinenweber, U.S. District Judge, N.D. Ill., Nov. 7

J. Spencer Letts, U.S. District Judge, C.D. Cal., Nov. 7

George H. Revercomb, U.S. District Judge, D.D.C., Nov. 7

Dickran M. Tevrizian, Jr., U.S. District Judge, C.D. Cal., Nov. 7

Confirmations

Laurence H. Silberman, U.S. Circuit Judge, D.C. Cir., Oct. 25

Richard H. Battey, U.S. District Judge, D.S.D., Oct. 25

José A. Fuste, U.S. District Judge, D.P.R., Oct. 25

John S. Rhoades, Sr., U.S. District Judge, S.D. Cal., Oct. 25

Lyle E. Strom, U.S. District Judge, D. Neb., Oct. 25

Robert E. Cowen, U.S. District Judge, D.N.J., Nov. 1

Edward R. Korman, U.S. District Judge, E.D.N.Y., Nov. 1

Jane R. Roth, U.S. District Judge, D. Del., Nov. 1

William J. Zloch, U.S. District Judge, S.D. Fla., Nov. 1

Alex Kozinski, U.S. Circuit Judge, 9th Cir., Nov. 7

Retirement

Miles W. Lord, U.S. District Judge, D. Minn., Sept. 11 (incorrectly listed in October issue as resignation)

Death

Edward W. Day, U.S. District Judge, D.R.I., Oct. 22

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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Justice Stewart Eulogized Nationally

Justice Potter Stewart

Justice Potter Stewart, who served
n the Supreme Court of the United
tates from 1958 until his retirement
: the end of the term in 1981, died
ecember 7th at the age of 70. He
ad been in ill health for the past sev-
al years.

Justice Stewart's home state was Ohio, and he had strong ties to that state. He replaced another justice from Ohio (Justice Burton), and when he was appointed by President Eisenhower he became the fifteenth justice to come to the Supreme Court from Ohio, either by birth or residence.

The Justice's father, James Garfield Stewart, was a member of the Supreme Court of Ohio and at one time was Mayor of Cincinnati. The Justice served as City Councilman in that city. His education was acquired in three countries—Switzerland, England, and the United States—and his law degree was earned at Yale Law School, where he graduated cum laude in 1941.

During World War II the Justice served in the U.S. Navy. He practiced law in New York and Cincinnati until he was appointed to the U.S. Court of

See **STEWART**, page 3

Bicentennial Commission Adopts Policies

At its meeting in late November, the Commission on the Bicentennial of the U.S. Constitution adopted policies governing its recognition and support of bicentennial projects and adopted other regulations and policies governing its future activities.

On Dec. 5, Dr. Mark W. Cannon, the Commission's Staff Director, appeared before subcommittees of the U.S. House of Representatives to support amendments to the act that created the Commission. Among the amendments are provisions that would permit an increase in Commission personnel and raise the limits on private donations.

The Commission distributed its first newsletter, in which it reported on its own activities as well as those of other groups throughout the country.

For further information, contact the Commission on the Bicentennial of the U.S. Constitution at its new office, 734 Jackson Place, N.W., Washington, DC 20503, telephone (202) USA-1787.

entencing Commission Chairman to Form Advisory Committee

udge Wilkins Sworn In as Chairman of U.S. Sentencing Commission

On Oct. 29, 1985, Judge William W.
ilkins, Jr. (D.S.C.) took the oath of office as
airman of the newly created United States
ntencing Commission. The oath was
ministered by the Chief Justice of the Uni-
States in the West Conference Room of the
preme Court with all other commissioners
attendance. Judge Wilkins was interviewed
The Third Branch *14 days later.*
Judge Wilkins was nominated to the fed-
l bench in 1981 by President Reagan.
ior to that, he was Assistant County Solici-
and then was Solicitor for the Thirteenth
dicial Circuit in South Carolina (the equi-
ent of being state district attorney) from
77 to 1981.
Judge Wilkins graduated from Davidson
llege and from the University of South

Judge William W. Wilkins, Jr.

Carolina School of Law, where he was editor-in-chief of the law review. Following law school, he served as a captain in the U.S. Army, and then clerked for Judge Clement F. Haynsworth, Jr. He has also been legislative assistant to U.S. Senator Strom Thurmond. For 8 years Judge Wilkins was in private practice in Greenville, S.C.

The President announced his nominations for the members of the Sentencing Commission on Sept. 12, 1985, including your designation as Chairman. The Senate confirmed these nominations on Oct. 16, and the commissioners took their oaths

See **WILKINS**, page 4

CALENDAR

Jan. 10–11 Judicial Conference Committee on the Budget
Jan. 13–14 Judicial Conference Committee on the Operation of the Jury System
Jan. 13–14 Judicial Conference Committee on the Administration of the Probation System
Jan. 13–14 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 15–17 Seminar for Bankruptcy Judges
Jan. 16–17 Judicial Conference Committee on the Administration of the Bankruptcy System
Jan. 20–21 Judicial Conference Committee on the Administration of the Criminal Law
Jan. 21–22 Judicial Conference Committee on Court Administration
Jan. 22–24 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 22–24 Seminar for Magistrates of the Ninth and Tenth Circuits
Jan. 23–24 Judicial Conference Committee on Rules of Practice and Procedure
Jan. 27–28 Judicial Conference Committee on the Judicial Branch
Jan. 27–29 Judicial Conference Committee on Judicial Ethics
Jan. 27–29 Workshop for Judges of the Ninth Circuit

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

University of Virginia Law School Receiving Applications for Judges' Graduate Program

The University of Virginia Law School is currently receiving applications for the next class in its graduate program for judges, scheduled to start in the summer of 1986. The program is designed for state and federal appellate judges; U.S. circuit judges are encouraged to apply. U.S. district judges are also admitted to the program.

The program requires attendance at two resident sessions at the law school in Charlottesville in the summers of 1986 and 1987. The 1986 session will run from June 30 through Aug. 8. The deadline for applications is Jan. 31, 1986.

The Board of the Federal Judicial Center has again authorized funding to defray expenses of a limited number of federal judges who are accepted for this program. Those funds, together with the University of Virginia program funds, make it possible for federal judges to pursue the program with all necessary expenses covered.

Requests for applications, forms, and other information should be directed to:

Daniel J. Meador, Director
Graduate Program for Judges
University of Virginia Law School

Video Program on Federal Habeas Corpus Practice Now Available Through FJC

The Center this month announced the availability of a video program, *The Theory and Practice of Federal Habeas Corpus for State Prisoners*, with Professor Ira P. Robbins lecturing.

The three-hour program, a survey of major habeas corpus issues, is composed of seven separate segments on four tapes. It covers the background of habeas corpus, jurisdictional matters, exhaustion of state judicial remedies, abortive state proceedings, appeals and successive applications, and, in the concluding segment, developments that may be anticipated. A handout with case citations and relevant statutory and rule provisions is available.

The program is available on audiocassette as well as videotape, and either version may be ordered from the Center's media library by writing Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked, and please be certain to specify either audiocassette (refer to catalog number AJ-738) (13 oz.) or videotape (catalog number VJ-073), and, if specifying videotape, whether 1/2" VHS format (3 lb.) or 3/4" U-Matic format (8 lb.). The volume of demand makes it impossible to process telephone orders.

The Center is not equipped to circulate its media holdings outside the federal judiciary, but chief judges of the circuit and district courts have been specially advised of the program's availability, in the event they wish to order it for use at meetings of state and federal judges or of court-sponsored programs for the bar.

Professor Robbins is Barnard T. Welsh Scholar and Professor of Law at the American University, Washington College of Law, and for the 1985-1986 academic year is serving as Judicial Fellow at the Center. In addition to his occasional lectures at various Center programs for judges and magistrates, Professor Robbins has spoken at symposia sponsored by the state-federal judicial councils in five states (see related story, p. 3). ■

State-Federal Judicial Council Meetings Discuss Sanctions, Calendars, Habeas Corpus

The year 1985 marked a resurgence of interest in the state-federal judicial council meetings, and some new subjects have emerged as a result of technological and other changes in the courts.

Montana's council, for example, had first on their agenda an exchange of information about use of video equipment as a training tool. As other councils have done, Montana's members discussed sanctions, especially as they relate to abuse of the discovery process. The sanctions Chief Judge James Battin imposed in the *Honda* case were used as a basis for the discussions. (*See Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985).)

New York's council met Dec. 2 in New York City and, among other matters, considered a report on habeas corpus cases written by Second Circuit Executive Steven Flanders and his staff. Statistics in this report show that of the 158 state habeas corpus cases reviewed by the Second Circuit over a two-year period (1983 and 1984), only three called for the unconditional release of a petitioner.

An outgrowth of the New York state-federal judicial council was a panel discussion of the merits of the individual calendar system, which attracted an audience of around 200 judges and lawyers. The panel was made up of two state and two federal judges, and both Chief Judge Sol Wachtler of New York's highest court and Chief Judge Wilfred Fein-

See COUNCILS, page 7

FJC Audiocassette on Federal Rules of Evidence Available

The Center's Information Services Office has available for loan a 90-minute audiocassette entitled *The Text of the Federal Rules of Evidence.* The audiocassette was produced by the Center in November 1985, and is current through that date. It contains only the text of the rules; it does not include advisory committee notes or any other interpretive material. Like all Center audiocassettes, it may be played on most home and automobile tape decks.

Federal judicial personnel may request this audiocassette by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Please send a self-addressed, gummed label, preferably franked (but do not send an envelope), and refer to catalog number 1-A. The cassette weighs six ounces. The volume of requests for such materials precludes the Center's taking orders by telephone.

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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STEWART, from page 1

Appeals for the Sixth Circuit at age 39, which made him the youngest federal judge then in service in this country.

Upon retirement, the Justice sat on several United States courts of appeals, in addition to making tape recordings for the blind, serving as an international arbitrator in an international case, and more recently on the President's Commission on Organized Crime and the National Bipartisan Commission on Central America.

Four years ago *The Third Branch* interviewed Justice Stewart in his chambers at the Court and he spoke candidly on several matters. Asked whether he had any regrets about anything in connection with the opinions of the Court, Justice Stewart answered, "Yes.... I wish I had had more time to write dissenting opinions." (See *The Third Branch*, vol. 14, no. 1, 1982.)

Justice Lewis F. Powell, Jr., writing in the Harvard Law Review in 1981 (95 Harvard Law Review 1 (1981)), noted that "Justice Stewart used oral argument to add an extra dimension to the Court's consideration of a case.... He skillfully used oral argument as a means of ensuring the kind of clarity of thought that exemplified his own writing.

"Justice Stewart wrote with a talent for phrasemaking that helped to convey complicated ideas in a few memorable words....Because his vote in cases was said to be 'unpredictable,' Potter Stewart was sometimes labeled a 'swing' vote. There is no doubt that...Justice Stewart was a voice of moderation. But he was always more than a check on judicial excess.

"In carrying out his responsibilities on the Supreme Court, Justice Stewart was ever conscious of the distinction between his personal

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WILKINS, from page 1

of office on Oct. 29. What have you done thus far by way of organization?

I recently met with representatives of the Federal Judicial Center and requested that descriptive sentencing data be compiled for use by the Commission as a starting point for its efforts. Further, we are now involved in organizing individual and group efforts of the commissioners based upon our particular fields of expertise.

What size staff will you have and where will your offices be located?

We intend to appoint a staff director and such other staff members as are necessary. Obviously, we will need a staff with legal and research backgrounds. I envision the staff totaling no more than 40 people, including administrative and secretarial personnel. As for office space, we are located at National Place, 1331 Pennsylvania Ave., N.W., Washington, DC 20004, telephone (202) 662-8800.

How large a budget will you have to do all this?

Well, we are unsure of the long-range budget over the period of years the Commission will be in operation. Congress has initially appropriated $2.3 million.

That should give you ample funds?

Well, it's more than ample to get started. I'm sure it will carry us for some time. We are in the process of preparing a formal budget to be submitted to Congress.

Did you know any of the other commissioners prior to their affiliation with the Commission?

The commissioners are generally recognized for achievements in their respective fields, and I knew some by reputation; however, I did not know any of them personally.

Your service as Circuit Solicitor in South Carolina must have prepared you for the work of the Sentencing Commission.

I believe that my practical experience in the criminal justice field has made me aware of the many issues in the administration of justice which this Commission will address. I believe that this will help the Commission in formulating practical, fair, and effective approaches to the very complex problem of sentencing criminal defendants.

Did you find your service as law clerk to Judge Clement Haynsworth a good way to enter the legal profession?

I was law clerk to Judge Haynsworth right after I finished my service in the army. No young lawyer could have asked for a better experience. There is no better way to start a legal career than having the opportunity to work with a man like Judge Haynsworth. We still share a very close relationship. He and I have offices in the same building so I have the privilege of seeing him frequently.

The initial terms of the commissioners are staggered but you have a full term of six years. In addition, the act specifically states that the chairman is to be full-time. What happens to the cases assigned to you?

My first priority must be toward discharging my responsibilities as Chairman of the Sentencing Commission. However, I do intend to continue my work as a trial judge so that the movement of cases in South Carolina as far as my docket is concerned will not be delayed. Chief Judge Harrison Winter of the Fourth Circuit has coordinated with my district's Chief Judge, Charles Simons, and arrangements are being made to bring in senior judges to help out. In addition, United States District Judge G. Ross Anderson, Jr., with whom I share the workload in the Piedmont area of South Carolina, has agreed to assist me so that my docket can be maintained and cases disposed of in a timely fashion.

"If any judges who ... read this article are interested in serving on such a committee, I would appreciate their getting in touch with me."

April 12, 1986, is the date set forth in the act for completion of the initial guidelines by the Commission. Can you meet this deadline and send them to Congress by that date?

The law creating the Sentencing Commission provided a period of 18 months in which the sentencing guidelines were to be drafted. This initial 18-month period expires in April of 1986. Since the commissioners were only sworn in a few weeks ago, we now have only a few months to accomplish this task unless the law is amended. A proper job cannot be done in this short period of time. Consequently, the Commission has requested an extension of 12 months. Since this extension would be in keeping with Congress's original intent, I believe our request will be granted. [A bill was passed in the House on Dec. 16 delaying to April 1987 the date when the guidelines must be submitted to Congress for approval.]

It sounds like you have very good collegiality in your court and the cooperation of the judges in the South Carolina district.

Fortunately, yes.

Could you expand on the role of the Federal Judicial Center and what support you are expecting from Center personnel?

Well, I've already referred to what the Center is doing by compiling descriptive data for the Commission. Director Levin has assured us of the full cooperation of the Center: providing some of the data that we are going to need, and acting as a gathering point to collect data from the various agencies, assimilate it, put it in an understandable format, and submit it to the Commission.

How about the circuit judges who could soon be reviewing appeals from sentences?

Well, obviously, the guidelines are

going to be used by all of the district judges, and the appellate judges will have their work cut out for them reviewing sentences. What I intend to do is to request representatives from the district courts and the appellate courts to serve on an advisory committee to our Commission so that we can have input as we go through this process—from those who will actually be using these guidelines. I might add, if any judges who happen to read this article are interested in serving on such a committee, I would appreciate their getting in touch with me so that we may consider their interest in this work.

As you approach the task ahead, what do you see as the most difficult part of your job?

I believe that the most difficult aspect of our work will be something that I have experienced for 15 years as a trial attorney and as a trial judge—that is, accommodating and coordinating conflicts among and between people in an effort to resolve issues. There is a tremendous opportunity with this Commission to do something about a problem which everybody agrees needs to be resolved somehow. Everyone agrees that we need sentencing reform. The disagreement is over how much is needed, what the problems have been, and whether our remedy will infringe on viewpoints which people feel very strongly are correct. The point is that this Commission has been entrusted with this task jointly by the President, Congress, and the judicial branch, and has been given both a great deal of guidance and a great deal of leeway in how we can best accomplish our goals. In order that our guidelines will not only do justice but will also have a wide range of approval, we will involve judges, prosecuting attorneys, defense attorneys, victims, prison and probation personnel, and others in the decision-making process.

The federal prisons will be affected very directly by your work. Will you keep this in mind as you approach your tasks?

With regard to prison capacity, the problem as I see it—and apparently as Congress sees it, too—is that a formulation of public policy, if it is responsible, must simultaneously weigh the cost of that policy. It would do us no good to promulgate guidelines which bring about prison conditions which are unacceptable to everyone. However, if in establishing our policy and guidelines it becomes evident that removing more dangerous, predatory offenders from the streets will in fact require more prisons, we cannot shirk the responsibility to recommend this to the Congress. On the other hand, we will be searching for meaningful alternatives to incarceration, which could very well reduce the number of certain types of offenders who are presently given sentences which require incarceration.

Do you anticipate that you might take the Commission with you to visit some of the prisons?

Norman Carlson has already offered to do this. The Commission plans to visit various levels of prisons in the very near future.

Are you concerned that firmly established guidelines will make the sentencing process too mechanical?

I do not see this as a problem. It appears to me that Congress clearly intended guidelines which are meant to be followed. I believe that the provisions—for instance in 28 U.S.C. section 991(b)—plainly allow for some flexibility to permit individualized sentencing when warranted, to recognize mitigating or aggravated circumstances. Judges are human and are blessed with the experience and common sense which should always be a part of any decision they make. It is not our purpose or our intent to take this out of the process. I know from a lifetime affiliation with the courts—by watching my father in court when I was a boy, by participating as a lawyer myself, and now as a judge—that judges as human beings show human virtues, but are also subject to human emotions, to inconsistencies. We sometimes make decisions in sentencing which could be better if the exercise of sentencing discretion were better structured.

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Judge Wilkins with Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, at Judge Wilkins's confirmation as Chairman of the Sentencing Commission.

WILKINS, from page 5

The result of sentencing practices today evidences great disparity, a sense of uncertainty and sometimes unfairness in the criminal process.

Do any of our states have anything similar to this?

Washington, Ohio, Minnesota, Pennsylvania, Maryland, and Florida have guidelines of one form or another.

"Everyone agrees that we need sentencing reform. The disagreement is over how much is needed."

The end result is to some degree a loss of respect for our system. This is not good, and this Commission was created to correct this.

Back to the circuit judges. They could vacate the sentence, they could remand to the district court, or a three-judge panel could substitute their own sentence?

The legislation is presently subject to some debate about the authority of appellate judges regarding their review of sentences. While the statute gives appellate judges the authority to "correct" a sentence, it would be unwise, in my judgment, to allow appellate judges to resentence a defendant. While technical corrections could be made if an appellate court found that the guidelines were erroneously applied, the better course would be to remand to the district court with instructions. Remember that the guidelines will provide for a 25 percent variance. A sentence should be imposed by the trial judge, with the defendant and all whom he wishes to speak for him in court. This is one area where I am confident that the Commission will make recommendations to the Congress to better define the role of appellate judges in reviewing sentences.

Judge, are there areas where the act is not really as specific as you would like it to be?

With any major act of Congress such as this, there are bound to be some areas that need some revision. That's one of our tasks, along with sentencing guidelines—to make recommendations to the Congress for amendments to the law where needed

Does any nation presently have sentencing guidelines?

My understanding is that the effort by the United States is the first effort in history by any country to adopt *mandatory* sentencing guidelines.

Perhaps you will be setting an example.

Well, I understand a great deal of interest has been generated in the European countries about the work of this Commission, and perhaps if we do a good job—and we all intend to see that that happens—we may not only be an example for individual states in this country but also an example for other nations.

When you first got word of your nomination were you somewhat overwhelmed by the magnitude and scope of the project?

"Overwhelmed" is certainly an understatement. This is a mammoth task that Congress has given us, but with that comes a great deal of challenge.

"Our job is to develop guidelines that not only meet the mandate of Congress but also serve the public and society."

It's sort of humbling?

It sure is. But it has also been encouraging to see offers of support coming from so many different directions. Of course, the Center has been most supportive. The Bureau of Prisons has offered its assistance; so have the Parole Commission, the Department of Justice, and the Administrative Office. We have a lot of help from a lot of good agencies.

Everyone involved shares your concern.

That's right. Well it's very interesting work, and everybody has a lot of expertise to give us, so we are going to draw on that as best we can. I want to draw upon the resources that we have in the government already. That will not only save us money—I think we will find that the best experts are there.

There is another thing we are going to do that I think is very important. We need the input from a lot of different people and those people are going to be judges who actually are dealing with this problem. District attorneys will be a tremendous resource, and defense attorneys; I've had contacts already with some of those groups. Victims' rights groups are very important, and we need their input. We intend to hold public hearings around the nation, because our job is to develop guidelines that not only meet the mandate of Congress but also serve the public and society, and we can't do that without input from these various parties of interest in the field.

The legislation that created the Sentencing Commission has a long history in the Congress. In view of this, do you believe politics will play any role in the work of the Commission?

All of the commissioners are presidential appointees. All of us come to the Commission with varying philosophies. And all of us are committed to developing a set of guidelines which are honest, workable, and just. We intend to keep the Congress informed as we work toward this ultimate goal. We will have free, open, and, I'm sure, heated debate. I am confident that our decisions will be motivated only by serving the interests of justice. ■

COUNCILS, from page 3

berg of the Second Circuit endorsed the concept of sharing information through their state-federal councils. Judge Roger Miner, now on the U.S. Court of Appeals for the Second Circuit, characterized the individual calendar system as a "more effective and cost-efficient system of case management that offers greater personal satisfaction and sense of craftsmanship...than the master calendar system." Judge Charles Brieant (S.D.N.Y.) agreed with Judge Miner, and said that through the use of the individual calendar system "work is done with fewer judges. When a judge has a case from beginning to end he becomes a 'craftsman' as opposed to an 'assembly-line worker.' " (For other comments on the individual calendar system, see the interview with Chief Judge Constance Baker Motley (S.D.N.Y.) in *The Third Branch*, vol. 17, no. 12, Dec. 1985, at p. 7.) Though New York's court system is committed to convert to the individual assignment system, Chief Judge Wachtler reminded the audience that the nature of their existing format made it essential to retain some flexibility, at least initially, to determine how changes can best be made.

In the South, council meetings continued with an emphasis on habeas corpus proceedings in the states of Georgia, Alabama, and North Carolina.

The Federal Judicial Center continued its support of these meetings through reimbursement of travel and per diem expenses as well as by providing speakers. Professor Ira Robbins of American University Law School, now a Judicial Fellow at the Center, attended meetings in these states (some of the meetings extending into a second day) to work out better procedures for handling troublesome issues that come to both the state and federal courts, particularly in capital cases. Professor Robbins also spoke about habeas corpus procedures at a meeting of U.S. magistrates in September, and in January he will repeat this talk when another group of magistrates meets. (The Center makes his lecture, *The New Federal Habeas Corpus: Options and Alternatives for the Federal Judge or Magistrate*, available to federal judicial personnel on audiocassettes. To borrow a copy, write to Information Services, 1520 H St., N.W., Washington, DC 20005, or call FTS 633-6365.)

Litigation, a quarterly put out by the Litigation Section of the American Bar Association, contains a relevant article on federal jurisdiction by Professor Thomas E. Baker, of Texas Tech University, now a Judicial Fellow at the Supreme Court. *See Litigation*, vol. 11, no. 3 (Spring 1985). ■

FJC Handbook for Federal Judges' Secretaries Revised

The Center has published a revised edition of its *Handbook for Federal Judges' Secretaries*. The present edition reflects developments since the publication of the second edition in 1984. The loose-leaf format of the handbook, and its dated pages, are designed to accommodate future additions and other supplementary material.

A reference aid for both new and experienced secretaries to federal judges, the handbook describes office procedures judges' secretaries have found useful. It treats such subjects as record keeping, maintenance of chambers calendars and office files, correspondence, and protocol, as well as general administrative matters. Also included are sections on case management, the organizational structure of the court system, and the language and process of litigation.

Copies of the handbook are being distributed to all appellate, district, and bankruptcy judges and to all full-time magistrates. A single copy is available to each clerk's office and probation office upon request to the Information Services Office, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (3 lb.). Please do not send an envelope.

FJC Report on Rule 11 Sanctions Available

An Empirical Study of Rule 11 Sanctions, by Saul M. Kassin, a Judicial Fellow during 1984-1985, was recently published by the Center.

In an effort to determine how district judges interpret and apply rule 11 of the Federal Rules of Civil Procedure, the author surveyed the reactions of federal district judges to a series of hypothetical situations, drawn from actual cases in which rule 11 sanctions were requested. The study outlines 292 respondents' standards for imposing sanctions, the rationales articulated by the judges, the kinds of sanctions imposed, and the relationship between the surveyed judges' opinions and their expectations of how their colleagues would rule on the same issues.

The case descriptions presented to the respondents, the accompanying questionnaire, and a number of tables summarizing the study's findings are included in the report.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (10 ounces). Please do not send an envelope.

PERSONNEL

Nominations

Duross Fitzpatrick, U.S. District Judge, M.D. Ga., Nov. 14

Robert J. Bryan, U.S. District Judge, W.D. Wash., Dec. 4

Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Dec. 4

Walter J. Gex III, U.S. District Judge, S.D. Miss., Dec. 4

David R. Hansen, U.S. District Judge, N.D. Iowa, Dec. 4

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Dec. 9

See PERSONNEL, page 10

Colleagues Remember Justice Stewart, Praise His Personal, Intellectual Qualities and Contributions to the Court

On Dec. 7, 1985, the Supreme Court released the following comments from the Justices on the death of Justice Stewart.

The Chief Justice

For more than two decades Justice Stewart gave dedicated and distinguished service to our country; first on the Court of Appeals (for the 6th Circuit) and then on the Supreme Court. His death removes a splendid jurist from the Bench. We mourn his loss.

Justice Brennan

Justice Stewart was more than a colleague and a very great and distinguished justice. He was a very close personal friend. I shall miss him very much.

Justice White

He was a great and extremely enjoyable colleage and I have missed him very much. I am sure he has left his mark in the books. Mrs. Stewart has all of Marion's and my sympathy.

Justice Marshall

He was truly great as a justice and as an American. He always put his country ahead of everything else.

Justice Blackmun

Potter Stewart carved out a distinguished career on the federal appellate bench. He added to the Supreme Court a basic centrist vision.

Justice Powell

Justice Stewart's ability as a jurist of great distinction is documented in some 80 volumes of the U.S. Reports. His highly constructive role in the day-to-day functioning of the Court can only be known by those privileged to serve with him. He often led in working out a consensus. He had the rare ability to be, at the same time, a forceful advocate and a generous colleague.

Justice Rehnquist

He was a good friend and a first rate judge.

Justice Stevens

Potter Stewart was a good friend and a great justice. He has been a true source of inspiration for me and I shall miss him more than I can say.

Justice O'Connor

I am particularly aware of the strong role played by Justice Stewart because I occupy the seat on the Court which he vacated in 1981. He devoted his life to public service and used his exceptional intellect for the enhancement of the quality of life for all citizens of this country. He was greatly admired by all his colleagues and his legion of friends throughout the land.

Administrative Office's 1985 Report on Federal Court Management Statistics Available

The Administrative Office of the U.S. Courts has released an annual report, *Federal Court Management Statistics*. The report contains information on the workload of federal judges during the years ended June 30, 1980, through June 30, 1985. The information is compiled from reports submitted to the Administrative Office by the clerks of the courts.

The report shows that the percentage change in total filings in the Court of Appeals for the District of Columbia was up by 58.1 percent in comparison to the previous year, while total filings in the courts of appeals for the Second, Third, and Fifth Circuits were down slightly. Total filings in the Fourth Circuit were up by 17.5 percent, and in the Eleventh Circuit by 12.4 percent. In the courts of appeals for the First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, total filings were up by varying percentages, but in each of these six circuits the increase was less than 10 percent.

For all of the circuit courts of appeals taken together, total filings were up by 5.9 percent over the previous year.

In the district courts, total filings in a year's time ranged from over 11,000 in the Southern District of New York to fewer than 1,000 in some sparsely populated districts.

The report reflects a 1984 change in the court of appeals statistical reporting criteria. Court of appeals workload statistics are shown as actions per panel because cases are generally handled by panels of three judges, while district court workload statistics are divided by the number of authorized judgeship positions in each court to provide the workload per judgeship. ■

Positions Available

Circuit Executive, U.S. Court of Appeals for the Ninth Circuit. Salary to $68,700. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. To apply, send resume to Chief Judge James R. Browning, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

Assistant Circuit Executive for Legal Affairs, U.S. Court of Appeals for the Ninth Circuit. Salary from $26,311 to $31,619. Applicants must be attorneys with minimum of two years' legal experience and active membership in a federal bar. To apply, send resume by Jan. 20 to Richard Wieking, Acting Circuit Executive, U.S. Court of Appeals, P.O. Box 42068, San Francisco, CA 94141.

Clerk, U.S. Bankruptcy Court for the Northern District of Georgia. Salary to $68,700. To apply, send resume by Jan. 15 to Ben H. Carter, District Court Executive, 2211 U.S. Courthouse, 75 Spring St., Atlanta, GA 33035.

United States Bankruptcy Judge. Salary $68,400; 14-year appointment. Vacancies will occur in the following districts: S.D. Miss., W.D. La. (two vacancies), and W.D. Tex. For qualification standards and to apply by Feb. 14, contact Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYERS

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers. Only those preceded by a checkmark are available through the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.*

"Annual Eighth Circuit Survey." 18 *Creighton Law Review* 1003 (1985).

√ Brennan, William J., Jr., "In Defense of Dissents." Address at Hastings College of Law, Nov. 18, 1985.

Bork, Robert H. "Styles in Constitutional Theory." 26 *South Texas Law Journal* 383 (1985).

√ Bork, Robert H. "The Constitution, Original Intent, and Economic Rights." Address at University of San Diego Law School, Nov. 18, 1985.

Butzner, John D., and Mary Nash Kelly. "Certification: Assuring the Primacy of State Law in the Fourth Circuit," in "Fourth Circuit Review." 42 *Washington & Lee Law Review* 449 (1985).

Clor, Harry M. "Judical Statesmanship and Constitutional Interpretation." 26 *South Texas Law Journal* 397 (1985).

Graglia, Lino A. "Judicial Review on the Basis of 'Regime Principles': A Prescription for Government by Judges." 26 *South Texas Law Journal* 435 (1985).

Kurland, Philip B. "Public Policy, the Constitution, and the Supreme Court." 12 *Northern Kentucky Law Review* 181 (1985).

McDermott, John T. "Personal Jurisdiction: The Hidden Agendas in the Supreme Court Decision." 10 *Vermont Law Review* 1 (1985).

Miner, Roger J. "A Judge's Advice to Today's Law Graduates." 57 *New York State Bar Journal* 6 Nov. 1985).

Options To Reduce Prison Crowding. National nstitute of Justice/NCJRS, 1985.

Robbins, Ira P. *Prisoners and the Law.* Clark Boardman, 1985.

"Seventh Circuit Review." 61 *Chicago-Kent aw Review* (1985).

Smith, Loren A. "Judicialization: The Twight of Administrative Law." 85 *Duke Law Journal* 427 (1985).

von Hirsch, Andrew. *Past or Future Crimes: eservedness and Dangerousness in the Sentencing of riminals.* Rutgers University Press, 1985.

Wilson, James G. "The Most Sacred Text: he Supreme Court's Use of *The Federalist Pap-s.*" 1985 *Brigham Young University Law Review* 65 985).

The Chief Justice congratulates members of the Sentencing Commission: (top, left to right) Michael K. Block, Helen G. Corrothers, Paul H. Robinson, and the Chief Justice; (bottom, left to right) the Chief Justice, Judge William W. Wilkins, Jr., Ilene H. Nagel, Judge George E. MacKinnon, and Judge Stephen G. Breyer.

Federal Courts' Budget Approved

The budget for the federal courts and their supporting personnel (exclusive of the U.S. Supreme Court, the Court of Appeals for the Federal Circuit, and the Court of International Trade) was approved by Congress Dec. 6 and signed by the President in the amount of $997,850,000 for 17,162 positions, an increase of 687 positions. The amount requested was $1,067,051,000 for 17,756 positions.

Were amounts for all courts included, the cumulative total approved would be $1,066,925,000. This is the second fiscal year the total budget for all federal courts has exceeded a billion dollars.

An amount of $32,750,000 is included for court security, which will support 888 contract security officers, who are under the supervision of the U.S. Marshals Service—an increase of 38 over 1985.

The House and Senate Conference action resulted in a denial of the request of $2,000,000 for a design for an office building on the United States Capitol grounds intended to house both the Administrative Office and the Federal Judicial Center. The conferees also restored $2,210,000, which is one-half of the one percent salary fund reduction that the Senate applied against "Salaries of Supporting Personnel."

The conferees included 100 additional officer positions (50 for probation and 50 for pretrial) and 50 additional clerical positions (25 for probation and 25 for pretrial). The 75 positions provided specifically for pretrial services are exclusively for districts with pretrial services organized outside probation and should be allocated to metropolitan districts with a total of six or more authorized judgeships. The 75 probation positions may be used to provide pretrial services through the probation office.

STEWART, from page 3

preference and the proper role of a judge. '[T]he first duty of a justice,' he said, is 'to remove from his judicial work his own moral, philosophical, political, or religious beliefs.' "

Attorney Lloyd N. Cutler, who argued five cases before the Supreme Court during Justice Stewart's tenure, noted in the Harvard Law Review that "Justice Stewart relished the oral argument above all aspects of his judicial chores. He believed that most close cases turned on the quality of the oral argument, and he contributed enormously to its quality." Mr. Cutler stated that "perhaps [Justice Stewart's] finest judicial quality has been his imperviousness to typecasting."

A former clerk of Justice Stewart, Jerold H. Israel, has written that in his opinions as a Justice, Justice Stewart was ordinarily "very wary of imposing any broad, rather absolute limits on the exercise of governmental power, although most willing to examine the facts of the particular case to determine whether that power has been abused in the situation presented there."

(For comments from the Justices on the death of their colleague, see p. 8.) ■

PERSONNEL, from page 7

Confirmations

Frank X. Altimari, U.S. Circuit Judge, 2nd Cir., Dec. 16
Glenn L. Archer, Jr., U.S. Circuit Judge, Fed. Cir., Dec. 16
Bobby Ray Baldock, U.S. Circuit Judge, 10th Cir., Dec. 16
John T. Noonan, Jr., U.S. Circuit Judge, 9th Cir., Dec. 16
Deanell Reece Tacha, U.S. Circuit Judge, 10th Cir., Dec. 16
David R. Thompson, U.S. Circuit Judge, 9th Cir., Dec. 16
Morris S. Arnold, U.S. District Judge, W.D. Ark., Dec. 16
Garrett E. Brown, Jr., U.S. District Judge, D.N.J., Dec. 16
Patrick A. Conmy, U.S. District Judge, D.N.D., Dec. 16
Duross Fitzpatrick, U.S. District Judge, M.D. Ga., Dec. 16
Lynn N. Hughes, U.S. District Judge, S.D. Tex., Dec. 16
Alan B. Johnson, U.S. District Judge, D. Wyo., Dec. 16
Harry D. Leinenweber, U.S. District Judge, N.D. Ill., Dec. 16
J. Spencer Letts, U.S. District Judge, C.D. Cal., Dec. 16
Robert L. Miller, Jr., U.S. District Judge, N.D. Ind., Dec. 16
George H. Revercomb, U.S. District Judge, D.D.C., Dec. 16
Stanley Sporkin, U.S. District Judge, D.D.C., Dec. 16
Dickran M. Tevrizian, Jr., U.S. District Judge, C.D. Cal., Dec. 16
James L. Buckley, U.S. Circuit Judge, D.C. Cir., Dec. 17

Death

Potter Stewart, Associate Justice, Supreme Court of the United States (Retired), Dec. 7

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 18
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FEBRUARY 1986

GOVT. DOC.

eputy Attorney General D. Lowell Jensen Discusses is Role in Operation of Department of Justice

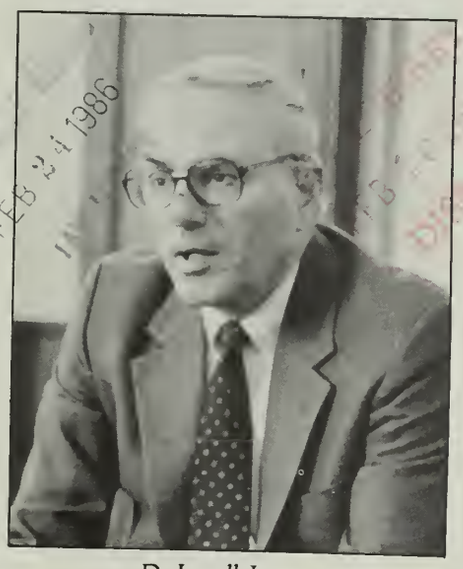
Deputy Attorney General D. Lowell sen was born in Utah but later moved to ameda County, California. He received his dergraduate and law degrees from the Uni- sity of California at Berkeley. After serv- in the Army from 1952 to 1954, he was uty District Attorney of Alameda nty (1955-1966). He was appointed trict Attorney for Oakland, California, 1969 and was elected to that position in 0. 1974, and 1978.

Mr. Jensen served a term as President of California District Attorneys' Associa- . He was an officer of the National Dis- Attorneys' Association and a founding ber of the Association's Commission on im/Witness Assistance.

February 1981, President Reagan inated Mr. Jensen to be Assistant Attor- General in charge of the Criminal Divi- From there promotions followed to ciate Attorney General under Attorney eral William French Smith and now to ty Attorney General under Attorney eral Edwin Meese.

Would you please describe what r responsibilities are as Deputy orney General?

he Deputy Attorney General is number two position of the artment of Justice, and that cer has responsibility, essentially, all the day-by-day operations of Department. My duties range ss the entire face of the Department—personnel issues, budget issues, policy development and operational issues. I answer to the Attorney General and act in lieu



D. Lowell Jensen

of the Attorney General in those instances where it is required.

Did the Attorney General restructure the office and its jurisdiction when he came into office?

That's essentially correct. The Department's organization at the time Ed Schmults served as Deputy had the civil functions of the Department reporting through the Deputy

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w AIMS Explained in New Two-Part Videotapes

he Center has recently completed deo program on New AIMS, its ellate Information Management em (see related story, p. 7). The gram, *New AIMS,* is in two parts of ut 45 minutes each and features ert Hoecker, Chief Deputy Clerk the Tenth Circuit Court of eals. Intended primarily for those rested in the detailed operation of system, it provides a thorough explanation of aspects of the New AIMS case opening and docketing functions.

Those within the federal courts wishing to borrow the program should write to the Center's Information Services, 1520 H Street, N.W., Washington, DC 20005. We regret that we cannot accommodate orders by telephone. Please specify the format you want (VHS or U-matic). ■

Chief Justice Releases 1985 Year-End Report

In his 1985 annual report on the judiciary, the Chief Justice cited facts and statistics that show an alarming increase in the workload of the federal courts, and an equally disturbing lack of judge power to handle this workload. Some of the points made by the Chief Justice follow.

- Though public attention has recently focused on the national budget, there exists another deficit with which we must cope, our "judicial deficit" in the federal court system, which continues to grow.
- The number of filings increased over last year's total, both in the district courts (5 percent in civil cases and 7 percent in criminal cases) and in the courts of appeals (6 percent). The district judges increased their terminations (11 percent in civil cases and almost 5 percent in criminal cases) and the circuit judges increased their dispositions (around 1 percent). The dispositions during the 1985 year were accomplished with approximately the same number of judges, "already overworked," the Chief Justice reported.
- The 85 additional judgeships created by Congress in July of 1984 brought more judges to the courts, yet there are still 56 vacancies in the new judgeship positions as well as 41 vacancies caused by the usual attrition. "[T]he total number [of judges], when available, are too few to deal with the ever-rising caseload and

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Study Authorized 7
Sentencing Commission Deadline
Extended 10

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enlarging jurisdiction. I have urged the President and the Senate to speed up the process."

• As in the past, the Chief Justice had words of commendation for the senior judges—federal judges who retire but continue to serve. Their aggregate contribution is equivalent to the work of at least 70 full-time active judges, said the Chief Justice, and, "Without the work of [these judges] the federal judicial system would have foundered." The Chief Justice is pressing Congress to remove the "Social Security barriers" that will cause a loss of services of senior judges.

• **Sentencing Commission.** Among other things, the Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission, charged with the promulgation of guidelines for district courts to follow in sentencing. The commissioners have already commenced their work and the Administrative Office and the Federal Judicial Center are lending their support to this effort.

• **Quality advocacy.** After six years of study by the so-called "Devitt Committee," and pilot projects conducted by 13 pilot district courts under the chairmanship of Chief Judge James Lawrence King, the Judicial Conference has recommended that all district courts consider various programs to ensure that lawyers admitted to practice in the federal courts meet at least minimum standards. In his annual report, the Chief Justice concludes that "This recommendation marks a milestone in a debate that may be traced to studies that were generated a dozen years ago. Every District Court should require a basic admission standard."

Developments important to both state and federal courts were also reported by the Chief Justice and included:

• **State Justice Institute.** Always a proponent of assistance to the state courts, the Chief Justice added his endorsement to that of the Conference of Chief Justices to urge that Congress create a State Justice Institute. This legislation became law Nov. 8, 1984, and an appropriation of $8 million will soon be available to assist the states in improving their administration of justice. This money will encourage judicial training and continuing education, and will support studies and projects dealing with sentencing, alternatives to litigation, and other improvements.

• **Prisons and Corrections.** Progress on improvement of prison programs for education, vocational training, and employment was realized in 1985. An outgrowth of the 1983 Scandanavian prison visit and the 1984 National Task Force on Prison Industries is the National Center for Innovation in Corrections, affiliated with the George Washington University in Washington, D.C. After a year of accomplishments, the National Center has a remarkable record of 21 concepts for prison industry projects that link private employers with prison systems. The National Center hopes that eventually this coalition will bring about employment of at least 50 percent of the nearly 500,000 state and federal prison inmates (the national prisoner employment average is now around 10 percent). Of great significance is the inclusion in the Comprehensive Crime Control Act of 1984 of a section that exempts up to 20 pilot programs from protectionist laws that previously prohibited transportation of prison-made goods in interstate commerce.

The above is a partial listing of the contents of the entire Year-End Report. Copies of the entire 15-page report are available by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed, gummed mailing label (but do not send an envelope). ■

THE THIRD BRANCH

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center

PERSONNEL

Appointments

Thomas E. Scott, U.S. District Judge, S.D. Fla., Aug. 16

Alan A. McDonald, U.S. District Judge, E.D. Wash., Oct. 18

Brian B. Duff, U.S. District Judge, N.D. Ill., Oct. 25

Alan H. Nevas, U.S. District Judge, D. Conn., Oct. 26

Glen H. Davidson, U.S. District Judge, N.D. Miss., Oct. 29

David Sam, U.S. District Judge, D. Utah, Nov. 1

Laurence H. Silberman, U.S. Circuit Judge, D.C. Cir., Nov. 1

Richard H. Battey, U.S. District Judge, D.S.D., Nov. 2

John S. Rhoades, Sr., U.S. District Judge, S.D. Cal., Nov. 4

Stephen H. Anderson, U.S. Circuit Judge, 10th Cir., Nov. 8

Ferdinand F. Fernandez, U.S. District Judge, C.D. Cal., Nov. 8

David B. Sentelle, U.S. District Judge, W.D.N.C., Nov. 8

Robert E. Cowen, U.S. District Judge, D.N.J., Nov. 12

Jane R. Roth, U.S. District Judge, D. Del., Nov. 16

Edmund V. Ludwig, U.S. District Judge, E.D. Pa., Nov. 18

Alex Kozinski, U.S. Circuit Judge, 9th Cir., Dec. 10

Resignation

Frederick Lacey, U.S. District Judge, D.N.J., Feb. 1

Senior Status

William H. Orrick, Jr., U.S. District Judge, N.D. Cal., Oct. 31

Jesse E. Eschbach, U.S. Circuit Judge, 7th Cir., Nov. 4

Death

Ray McNichols, U.S. District Judge, D. Idaho, Dec. 25

Russell Wheeler to Direct Center's New Special Educational Services Division

A new Federal Judicial Center Division of Special Educational Services has been approved by the Center's Board to accommodate the increase in the training responsibilities of the Center. The new Division will be headed by Russell R. Wheeler, currently Deputy Director of the Continuing Education and Training Division. Mr. Wheeler was one of the first Judicial Fellows when the program was started in 1973. At the Supreme Court he served as Research Associate to the Administrative Assistant to the Chief Justice. From the Court he went to the National Center for State Courts, where he was a Senior Staff Assistant. In 1977, he returned to Washington to become Assistant Director of the Federal Judicial Center.

The Division of Continuing Education and Training, directed by Kenneth C. Crawford, will continue to be responsible for the Center's orientation and continuing education seminars and workshops for judges and supporting personnel. That Division will also continue to work with the Center's network of training coordinators and to administer the specialized tuition support program.

The new Division will be primarily responsible for the production of audio and video media education programs; educational publications, including reference manuals and monographs; administration of the Center's programs on sentencing policies and practices; and the growing number of special seminars and workshops, especially for judges, including the annual summer programs for circuit and district judges, satellite video seminars, and educational programs in support of state-federal judicial councils.

This organizational change will require no additional personnel or funds and is effective Feb. 1, 1986.■

The Chief Justice with some of the members of the Judicial Conference's Bicentennial Committee: (l. to r.) Judge Damon Keith (6th Cir.), Judge Helen Nies (Fed. Cir.), Chief Justice Burger, Chief Judge Robert Murphy (Md. Ct. App.), and Judge Dolores Sloviter (3rd Cir.). *See story, page 10.*

Legislation Affecting the Federal Judiciary Introduced in the First Session of the 99th Congress

Congress adjourned in 1985 without taking final action to extend the temporary exemption of senior judges from Social Security taxation. Action should be taken to permanently exempt senior judges in early 1986. Appropriate language was approved by both the House and Senate before Dec. 20, but failed of final passage due to controversy concerning a totally unrelated provision in the bill containing the senior judge provision.

A number of other legislative measures of interest to the federal judiciary were passed by the House and were still pending when Congress adjourned. They are summarized below.

H.R. 3550, the Rules Enabling Act of 1985. Passed by the House on Dec. 9, this bill has as its purpose revision of the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective. The bill provides for greater participation in the rule-making process by all interested persons, including members of the bench, bar, and public.

H.R. 3570, the Judicial Improvements Act of 1985. Passed by the House on Dec. 16, this omnibus bill effects reforms in several areas. The bill contains Judicial Conference-recommended reforms in the Judicial Survivors' Annuities Program. Among the reforms implemented by H.R. 3570 are increased annuity amounts for beneficiaries; preservation of the program's financial integrity; adjustments in eligibility standards; and provisions authorizing all currently serving judges to either "opt in" or "opt out" of the program. Because the existing program is an elective one, most new judges have in recent years elected not to participate. There have been

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CALENDAR

Feb. 9-15 Seminar for Newly Appointed District Court Judges

Feb. 10-12 Video Orientation Seminar for Newly Appointed Bankruptcy Judges

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to the Attorney General and the criminal functions reporting initially to an Associate Attorney General, then to the Deputy, and then to the Attorney General. My background is in the criminal law area and I was the Associate. What we contemplate in terms of structure during my service as Deputy would have the criminal portions of the Department reporting directly through me to the Attorney General, and the duties of the Associate essentially being related to the civil activities of the Department.

You have a California background. Did you know the Attorney General and the President in California?

I've been a prosecutor my whole professional career and was in the district attorney's office in Alameda County when Ed Meese joined that office. We were colleagues in the office for several years, and then, when President Reagan was elected as Governor of California, Mr. Meese went to the staff of the Governor and basically conducted liaison activities with all law enforcement entities in the state. One of my responsibilities at that time, as District Attorney in Alameda County—I had by then become District Attorney—was to represent the California District Attorneys' Association on legislative issues. So I dealt with Mr. Meese in that capacity and with the President at that time as Governor of California.

Each administration selects certain kinds of cases to concentrate on. Do you have any special programs that will have your and the Attorney General's special interest? What kinds of cases do you anticipate will be filed in the federal courts?

The emphasis by the Department on drug trafficking cases will continue. If you go back to the early days of Attorney General Smith's administration, a task force report on violent crime was prepared. In essence it set our focus on drug trafficking as a top priority. And so we will continue to do just that. Our other criminal areas of enforcement interest will be in organized crime and in white-collar crime, so all those activities will receive focus in terms of what can be expected of cases to be filed in federal courts.

Anything additional?

Those are really the basic areas. Obviously, our responsibilities run across the whole range of the criminal justice world, and when you talk about priorities you don't exclude other kinds of responsibilities.

"I've been a prosecutor my whole professional career."

But you only have so many U.S. attorneys and so many lawyers in the Department, and there is a lot of crime in this country.

That's right, and our activities will include enforcement of any federal law. You realize that most of the prosecution that takes place in the world of criminal justice is at the state and local level. That's an area of emphasis also; we have to build very strong partnerships with state and local entities.

Have you established special arrangements with state entities to assure that federal and state efforts are coordinated, especially in the criminal area?

That was one of the subjects that was discussed in the task force report—the need for a system of cooperation with state and local entities. Attorney General Smith ordered each U.S. attorney to reach out to form law enforcement coordinating committees across the country and that is taking place in a very successful sort of way—to build a partnership with state and local law enforcement officials.

Are these groups functioning in a manner similar to the state-federal judicial councils suggested by the Chief Justice?

To some extent. The Chief Justice is absolutely correct; you can't look at the state and local systems and the federal system as separate, autonomous entities. They have a great deal of overlap. In our world of enforcement, for example, there is a great deal of overlap and concurrent jurisdiction over criminal conduct, and there is a real need that we fashion our efforts so that they are complementary rather than independent or contradictory.

President Reagan has a Legal Affairs Council that meets from time to time. Do you have any relationship to that council?

At this time, in this term, there are two councils at the policy cabinet level. One is a domestic policy council and the other is an economic policy council. The Attorney General is the chair in the domestic policy council, and so that relationship continues in that fashion. And, obviously, I have a relationship to assist the Attorney General as the chair.

Do you attend the council meetings when the Attorney General is out of the city or otherwise unable to attend?

That's the role of the Deputy, and I do on those occasions; when he is not able to attend I represent the Department in his stead.

When the Attorney General met with the Judicial Conference of the United States last September, were you in attendance?

No, I was not.

Chief Justice Appoints Committee on AO

The Chief Justice has appointed an Ad Hoc Advisory Committee of Judges to examine the Administrative Office of the U.S. Courts concerning organization, responsibilities, personnel, and inter- and intra-judicial relationships.

Senior Judge Edward J. Devitt (D. Minn.) has been appointed Chairman of the Committee. Other members of the Committee are Chief Judges James Lawrence King (S.D. Fla.), Jack B. Weinstein (E.D.N.Y.), and Robert J. McNichols (E.D. Wash.). [Judge Ray McNichols, initially appointed to the Committee, died Dec. 25.]

The Attorney General mentioned then that he would move quickly on 20 circuit court judgeships and 66 district court judgeships. Is any significant progress being made to process these judgeships?

I think that there has been a good deal of progress. As you know, the process includes a series of steps. There are only, perhaps, a dozen positions in both the circuit courts and the district courts where no person has been identified as the candidate. Every other candidate has been identified, and they are either at stages where there are background investigations under way, and they are being considered by the American Bar Association for their recommendations; or they are awaiting Senate action. At this point the full course has been run for many appointments. The Senate has now confirmed some 60 judges of the circuit and district courts across the country in this congressional term and another 10 to 15 positions are awaiting Senate action at this time. [Mr. Jensen's statistics refer to the Department's estimates as of last October.]

So a lot of it awaits action in the Senate?

Well, there are different people who have parts of this process, and I think one has to look at the whole process to see how it is moving.

Some attorneys general in the past have not sought or considered the independent investigations and evaluations of candidates for federal judgeships conducted by the American Bar Association. Do you think the ABA is helpful to the Department of Justice?

Well, this process now includes a reference to the American Bar Association for their review and recommendations of all the appointments to the district courts and the circuit courts. I think it is helpful.

Does the Office of Legal Policy handle the judgeships in conjunction with Mr. Fielding at the White House?

The Office of Legal Policy handles the preliminary review and processing of potential candidates here in the Department; then a discussion takes place in the Department and recommendations are made by the Attorney General. They are then discussed and reviewed in joint sessions with White House representatives and the Counsel for the President, Fred Fielding.

Are special efforts being made to have judgeship nominations representative of minorities and women?

Our efforts in terms of identifying candidates for presidential appointment are to find the highest quality judges in terms of legal experience, legal skill, and judicial qualities. That's our emphasis, and I think we find qualified candidates in all areas regardless of their ethnic or racial background.

Do you advise the candidates that come through here?

We don't give advice to the candidates. We think the candidates know what the issues are when they have their confirmation hearings, and I guess they have now become a matter of discussion. Candidates know what that is, and that's part of the confirmation process.

"We have to build very strong partnerships with state and local entities."

The Department of Justice requested permission to participate in the argument in the abortion case and that was denied. [*Thornburgh v. American College of Obstetricians and Gynecologists*, argued in the Supreme Court Nov. 5, 1985.] Did you consider that as a setback?

I wouldn't consider that a setback. Our participation there is submission of an amicus brief. It's very unusual that in circumstances of that nature amici be given time to argue, so we don't consider that a setback at all. We are well aware that that is very unusual—that those kinds of requests would be granted—so that we were not surprised by the denial.

Do you propose to make similar requests in other cases in order to advance other issues to the Court that you think are important for decision on that level?

I don't think that there is any difference from our normal procedures. We would either participate directly in those cases or seek amicus participation, with briefs or arguments. And, once again, I don't think it is the usual case that in our status as an amicus we would be given time to argue. There are such cases, but they're infrequent.

Do you have some pending now?

I don't know if there are any where we have been given time for argument.

The first order list for this term of court came out Oct. 7. How did you fare on that?

D. Lowell Jensen

There are several areas where the Department is a participant because of our interest. We've already mentioned the abortion cases. There are a number of cases involving issues in public employment, cases such as the post-*Stotts* cases, that are of great interest to the Department.

There are also cases involving resolution of issues in voting rights. There are cases dealing with the use of challenges in jury selection. Those

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are all of interest to the Department and they are all part of this term.

The Attorney General and the Deputy Attorney General have traditionally taken part in some of the cases argued before the Supreme Court. Do you plan on doing that?

There's no specific case I know of right now that would be of such interest. The problem is time; whether we would have enough time to do it.

A recent press release related to the FBI's computer system, and a plan to permit closer scrutiny of those individuals suspected of but not yet charged with committing white-collar crimes. Congressman Edwards of California referred to this when it came up at the Department's budget hearing, and he said that he was troubled by this plan because such a scheme could include innocent people; that he believed it "could include Communists and homosexuals." Some, he felt, could get swept up in a computer system that might be too comprehensive. He went so far as to say that the Department should go slowly on this, and to suggest that Congress might opt for limiting the Department's funds so that they could not be used for that particular computer program.

Let me see if I could respond to that. We are obviously very sensitive to the issues that surround the use of the so-called NCIC system. It is an incredibly important law enforcement tool, one that must be maintained, and we are as concerned and as aware of the sets of issues as the Congressman is. We do not want to do anything that will jeopardize the ongoing use of NCIC. We think this is a positive, forward type of system use. It isn't one that we need to move on with any other degree of expedition other than the fact that it would be an enhancement and a positive step forward. I think that maybe there is some misunderstanding about the system. The system that we contemplate putting in place—and essentially it would be experimental—to see whether or not it is useful—would simply allow investigative agencies, police agencies that have existing ongoing investigations, in fraud areas to be specifically defined, to simply notify the NCIC of the fact that there is such an investigation. If two agencies put identical entries into the system, the system would instantly show a "match." The system would then notify the police agencies involved that they should speak to each other about what appeared to be related investigative efforts. So nothing would go into the system other than the fact that there were ongoing investigations. Essentially what the system will do is replace with technology the ability of an agency to know that there are parallel investigations going on without making several thousand phone calls around the country. It's really not one that jeopardizes privacy interests at all, and the notion that it would include, as the Congressman said, Communists or homosexuals. It would only include them if they happened to be subjects of fraud investigations.

"I have been interested in seeing the exclusionary rule limited to an appropriate definition, and I think that the recent actions of the Supreme Court were consistent with that."

Did you get what you needed in the budget?

I think that the budget appropriations for NCIC are intact. We will be sensitive to this and we will not move in a way that would affect the appropriation. But we are going forward with the design and implementation of the system, and I think it is consistent with the appropriations.

Do you have your budget now for the whole Department?

The present Congress is considering the 1986 budget and it's still in process—fiscal '86.

Counting the whole budget, it must be enormous.

In one sense it's a great deal, and in another sense it's not so great. The budget is roughly at a level of $4 billion for the total Department. That's everything. There are something like 60,000 persons who work for the Department of Justice. Most of them are in the investigative agencies—bureaus like the FBI, the prison system, and the Immigration and Naturalization Service. That's where most of the dollars and people are located. And then, of course, there's a good deal for the civil and criminal responsibilities both in the litigative divisions here in Washington and in the offices of U.S. attorneys. In one sense $4 billion sounds like a lot. In another sense, it's not a great deal for a department with responsibility for all federal criminal and civil activities in the United States.

How many lawyers do you have just in Washington?

It's roughly 2,000, either here in Washington or in field offices that are part of the litigative divisions centered here in Washington.

What is the status of appointments for the State Justice Institute?

They are presently pending for appointment by the President. There are two levels of appointments. One comes from judges who have been nominated by the Judicial Conference. The names of those judges have gone over to the White House and they are presently being considered. Then the law contemplates that four other persons would be nominated, and a list of those persons has now been submitted to the White House. They are all presently pending and relatively shortly we expect that the appointments will be made.

What are some of your long-range plans for the Department that you would like to see come to fruition during your term in office?

We've already discussed some of the areas of interest for us; for example, the criminal enforcement program, which we will continue to refine and improve. In a general

sense, I would like to see that we make a permanent part of the criminal justice landscape the federal, state, and local relationships I spoke of. I believe in that very strongly. I think we've made a good start, however, but I think that we must continuously improve in order, as I say, to make it permanent. From a management standpoint, I would like to see us improve the Department's management information systems. We're on a growth curve as far as that is concerned; however, I would like to see us get to a much higher level of capacity in our use of technology in the area of management information.

You have written and spoken publicly about the exclusionary rule. Do you have a special interest in the rule?

I don't have any, other than the fact that, as I said, I've been a prosecutor my whole life and have watched the exclusionary rule come into existence and be defined over time. I have been interested in seeing the exclusionary rule limited to an appropriate definition, and I think that the recent actions of the Supreme Court were consistent with that—in terms of their *Leon* decision as to the scope of the exclusionary rule in cases where a search warrant is involved. I frankly would like to see the same kind of concepts as in *Leon* move forward in nonwarrant cases. I think that's where we ought to be as far as the exclusionary rule is concerned.

What's the status of the *Scaduto* case? He was the one who sued the crime commission because he was subpoenaed. Is the Department going to continue its interest in the case?

There is current consideration of that. My recollection is that the issue is whether or not we would seek certiorari, and that is now being considered. We think the *Scaduto* case is a very important case in that it does possibly affect a whole series of commissions that are out there and that have been there in the past. I think that it needs resolution. I'm not sure exactly where we are on that track, but it is a matter being considered.■

Ninth Circuit's New AIMS Program in Operation

The Ninth Circuit Court of Appeals will open the new year with a full-scale test of the case-opening portion of the New Appellate Information Management System (New AIMS) that has been developed by the Federal Judicial Center in cooperation with the Fourth, Ninth, and Tenth Circuits acting as pilot court sites.

Cathy A. Catterson, Ninth Circuit Clerk, reports that as of Jan. 3 her office started entering all new appeals into New AIMS. As a security precaution during the early stages of the test, the office is making frequent printed copies of the docketed information. As the accuracy and stability of the system are validated, the reliance on printed copies as backups will decrease, until, finally, printed docket sheets and other reports will be created only as needed for the court and parties.

The other two pilot courts will also soon begin entering data into the fully automated New AIMS docketing system. At present, the Fourth and Tenth Circuits project a March starting date.

These tests of the New AIMS system mark the first use of fully electronic docketing for the federal courts of appeals. Fully electronic docketing has been used to manage the felony dockets in many of the largest federal district courts since the early 1980s, when the Federal Judicial Center's COURTRAN Criminal system was transferred as an operational system from the Federal Judicial Center to the Administrative Office for subsequent maintenance and expansion. The goals of both systems are to speed the generation and retrieval of important case management information and to eliminate unnecessary reliance on and storage of paper records.

The New AIMS system is the first full-docketing records replacement system to be operated on computers installed in the courthouse and operated by local court staff. The earlier COURTRAN Criminal system depended on very large computers based in Washington and linked to the courts over telephone lines. Improvements and efficiencies in new computer and software technologies now allow all information processing to be controlled in the court by specially trained members of the clerk's office staff. Decentralized operation of programs designed and constructed according to national technical and substantive specifications is the hallmark of automation under the *Five-Year Plan for Automation in the United States Courts*, which is the document that guides the activities of the Federal Judicial Center and the Administrative Office in this generation of federal court automation development.

New AIMS is the first of three full-docketing systems the Center intends to transfer to the Administrative Office for maintenance and expansion. Another is a complete bankruptcy system, called BANCAP, which the Center is developing with the cooperation of the Western District of New York, the Western District of Texas, and the Western District of Washington. The third, and perhaps most complex, system is designed to fill the needs for docketing and managing the civil docket in the district courts. It is under full pilot test in the Arizona and the District of Columbia district courts, with further assistance from the Northern District of Georgia and the Western District of Texas. ■

New Judiciary Building

After many years of "urgings," Congress responded to the Chief Justice's request for a building to house all administrative personnel of the Judiciary in one place. The Administrative Office now occupies space in six locations and the Federal Judicial Center occupies space in four locations. Congress authorized $2 million for studies and plans.

CONGRESS, from page 3

several reasons for this, principally the absence of a "floor amount annuity" for survivors, the relatively small amounts of annuities derived under the standard computation formula, and inadequate statutorily mandated amounts payable to surviving children.

H.R. 3570 also addresses an existing problem concerning removal of cases from state to federal courts. Under present legislation, a litigant who tries to remove his or her case to federal court may have the case dismissed if the state court in which the action was initially brought did not have jurisdiction. H.R. 3570 would abolish the present judicial rule that an improvidently brought state civil action, the subject matter of which is within the exclusive jurisdiction of a federal district court, must be dismissed when it is removed to the federal district court by the defendant under 28 U.S.C. § 1441.

H.R. 3570 also would authorize payment of actual travel expenses to judges, not to exceed a ceiling amount established by the Judicial Conference, rather than the Office of Personnel Management. In the past judges have suffered financial losses when required to travel extensively, because the OPM-authorized amounts allocated for expenses have not adequately reflected regional cost differentials.

H.R. 3570 would also bring the fee schedule for the United States District Court for the District of Columbia into line with fee schedules in other district courts. (Presently, it costs only $10 to file a case in the United States District Court for the District of Columbia.) The exemption of this district court from the general fee provision originated in a period preceding the creation of the local Superior Court system in the District of Columbia.

Finally, H.R. 3570 clarifies the jurisdiction of the federal courts of appeals for judicial review of orders issued by the Federal Maritime Commission and the Maritime Administration in the Department of Transportation, and contains a technical corrections section renumbering three separate sections 1364 in the United States Code.

H.R. 3004, the Criminal Justice Act Revision of 1985. Passed by the House on Dec. 9, this bill would implement improvements in the administration of the Criminal Justice Act (CJA), including increases in compensation levels that may be paid to attorneys. The bill would raise the maximum hourly compensation rate to $50, but permit variations to as high as $75 per hour in those districts where such need is shown. The bill would eliminate the in-court and out-of-court hourly rate differential. The bill also would increase the overall per-case compensation maximums from $2,000 to $5,000 for felonies, from $800 to $1,500 for misdemeanors, to $3,000 for appeals, and to $1,000 for any other representation provided under the CJA, and increase the amount that may be incurred for the services of experts.

Matters still pending before the House Judiciary Committee for further consideration include court-ordered arbitration, creation of an intercircuit tribunal, and the Supreme Court's workload. ■

NOTEWORTHY

Study released. The Fund for Modern Courts, Inc., a nonprofit court reform organization located in New York, has released a study of the success of women and minorities in achieving judicial office. The study finds that such success depends to a large extent upon the method of selection, with a higher percentage of women and minorities chosen through an appointive process than through an elective system. (*See* "The Source," p. 9.)

New newsletter. The American Bar Association Lawyers Conference Task Force on the Reduction of Litigation Cost and Delay has issued the first issue of *Change Exchange*, a quarterly newsletter. The newsletter will report on efforts to reduce trial costs and delays.

Rand tort study. The Rand Corporation's Institute for Civil Justice, after conducting a two-year study of asbestos litigation, has concluded that a national commission is needed to address the problems that mass toxic-tort lawsuits are creating. The report, released in December, said that the commission is needed to study alternatives to the traditional tort system.

FJC's Summer 1986 Seminar to Discuss Constitutional Adjudication and the Judicial Process

The Center will sponsor a seminar on "Constitutional Adjudication and the Judicial Process in the Federal Courts" from June 16 to 20, 1986, on the campus of the School of Law, Boalt Hall, at the University of California at Berkeley.

The seminar will treat selected constitutional questions that are on federal court dockets in the 1980s and consider basic structural issues, such as federalism and judicial review, in the context of current litigation trends. Although the seminar's primary focus is on problems of substance and procedure in their contemporary manifestations, it will also, with an eye to the constitutional bicentennial celebration, give attention to their historical origins and evolution.

The seminar is being developed in consultation with a Center committee appointed by the Chief Justice and chaired by Chief Judge Howard Bratton (D.N.M.). Serving with him are Judges Daniel Friedman (Fed. Cir.), Antonin Scalia (D.C. Cir.), and Louis Pollak (E.D. Pa.).

Judges wishing to participate in the seminar should indicate that fact by letter to Russell Wheeler, Director of the Center's new Division of Special Educational Services (see related story, page 3). To ensure consideration, letters should be received by Feb. 17. ■

Three New Reports Released by Center

The Center recently published *Attorneys' Views of Local Rules Limiting Interrogatories,* by John Shapard and Carroll Seron.

This staff paper reports the results of a survey undertaken at the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States to help inform the Committee on proposals to impose limitations on interrogatories on a national basis.

Responses to the survey questionnaire were received from 271 attorneys who practice in one or more of 12 federal judicial districts with local district court rules limiting interrogatories. On the basis of these responses, the paper's authors conclude that such rules are effective in precluding unwarranted use of interrogatories without causing significant interference with the appropriate use of that discovery method.

The paper includes tables setting out the data derived from the survey as well as the questions asked the respondents.

The Center has released a publication entitled *Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals,* by Joe Cecil and Donna Stienstra of the Center's Research Division. The report describes the procedures and standards adopted by the federal courts of appeals for deciding cases without oral argument. It presents available statistical information, reviews local rules, and discusses responses of the clerks of the courts of appeals to a brief survey regarding court practices. The report does not attempt to evaluate the screening programs.

The Center recently published *Disability Appeals in Social Security Programs,* by Harvard Law School Professor Lance Liebman. This 45-page monograph analyzes how the courts have treated the basic substantive issues that disability appeals typically present. These include the duration of the disability, the nature of the alleged medical impairment, problems with medical evidence, the concept of "substantial gainful activity," the relationship between the origin of a disability and the claimant's covered status, termination of eligibility, and various administrative issues.

Although the bulk of the monograph describes the administrative procedures and legal issues involved in disability appeals, the paper also calls attention to the tension between bureaucratic imperatives and the judiciary's obligation to ensure fair treatment for individuals.

Copies of these papers can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but please do not send an envelope). ■

Positions Available

Clerk, U.S. District Court, Western District of Michigan. Commencing Apr. 1, 1986. Salary to $67,940. Requirements include 10 years' administrative experience (law practice may be substituted for general administrative experience; college education and degrees in public, business, or judicial administration or law may be substituted partially for general administrative experience). Send resume (original and three copies) by Feb. 28 to Stephen W. Karr, U.S. Magistrate, 666 Fed. Building, Grand Rapids, MI 49503.

Clerk, U.S. District Court, District of Kansas. Salary to $68,700. To apply, send resume by Apr. 1 to Earl E. O'Connor, Chief Judge, U.S. District Court, 122 Federal Building, P.O. Box 1428, Kansas City, KS 66117.

Chief Deputy Clerk, Tenth Circuit Court of Appeals, Denver, CO. Salary $37,599 to $67,940. High school graduate with at least six years' progressively responsible administrative or professional experience. College education may be substituted for general experience. Master's degree or graduate study may be substituted for two years' specialized experience.

Send resume and three copies, by Feb. 15, to Robert L. Hoecker, Clerk Designate, U.S. Court of Appeals, C-404 U.S. Courthouse, Denver, CO 80294, Phone: 303/844-3157 or FTS 564-3157.

Assistant to Circuit Executive, Fifth Circuit Court of Appeals. Salary to $44,430. Assists with Judicial Council matters, process for selection of bankruptcy judges, special research and study projects, and court planning. Requires undergraduate degree and work experience that clearly demonstrates administrative capability. Law degree helpful. Send resume by Mar. 15, 1986, to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

Assistant to Circuit Executive, Fifth Circuit Court of Appeals. Salary to $44,430, based on experience and qualifications. Serves as the circuit's space and facilities specialist, assists with compiling and evaluating court statistics and preparing statistical reports, and on special research projects. Degree in public, business, or judicial administration desirable. Send resume by March 15, 1986, to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYERS

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Community Mediation In Massachusetts: A Decade of Development, 1975-1985. Distric Court of the Trial Court of the Commonwealth of Massachusetts, 1986.

Finn, Peter. "Collaboration Between the Judiciary and Victim-Witness Assistance Programs." 69 *Judicature* 192(1986).

Gold, Michael E. "The Similarity of Congressional and Judicial Lawmaking Under Title VII of the Civil Rights Act of 1964." 18 *U.C. Davis Law Review* 721 (1985).

Maggiolo, Walter. *Techniques of Mediation.* Oceana Publications, Inc. 1985.

Morris, Richard B. "The Constitutional Thought of John Jay." *This Constitution : A Bicentennial Chronicle.* Project '87 of the American Historical Association and the American Political Science Association. Winter 1985.

Sabino, Anthony M. "Jury Trials in the Bankruptcy Court: A Continuing Controversy." 90 *Commercial Law Journal* 342 (1985).

The Success of Women and Minorities in Achieving Judicial Office: The Selection Process. Fund for Modern Courts, Inc., 1985.

Survey of Judicial Salaries. National Center for State Courts, Nov. 1985.

Swanson , John. "Privacy Limitations on Civil Discovery in Federal and California Practice." 17 *Pacific Law Journal* 1 (1985).

"Symposium on Bankruptcy." 38 *Vanderbilt Law Review* 665 (1985).

Tribe, Laurence H. *Constitutional Choices.* Harvard, 1985.

Umbreit, Mark. "Victim Offender Mediation and Judicial Leadership." 69 *Judicature* 202 (1986).

Winick, Bruce J. " Restructuring Competency to Stand Trial." 32 *UCLA Law Review* 921 (1985).

Chief Justice Appoints Judicial Conference Committee on Bicentennial of U.S. Constitution

A Judicial Conference Committee on the Bicentennial of the U.S. Constitution has been appointed by the Chief Justice as a special committee of the Judicial Conference of the United States. The Committee will dedicate its efforts toward encouraging the observation and celebration of the Constitution's bicentennial by the Judicial Branch.

The Committee, chaired by Chief Judge Howard T. Markey of the U.S. Court of Appeals for the Federal Circuit, held its initial, organizational meeting at the Supreme Court on Dec. 18 to begin planning for events extending from the 200th anniversary date of the Constitution's signing, Sept. 17, 1987, through the 1989 ratification anniversary.

Chief Judge Markey has announced that the Committee members, working with the Chief Justice, will design and implement programs and recommend them to circuit and district court bicentennial committees on behalf of the Judicial Conference. The Judicial Conference Committee on the Bicentennial of the U.S. Constitution will work closely with the National Commission on the Bicentennial of the U.S. Constitution. Chief Judge Markey will be liaison officer with the National Commission; Chief Justice Burger will be an ex officio member of the Judicial Conference Committee. ■

Deadline for Sentencing Commission Extended

The Senate has passed and President Reagan has signed legislation extending the time within which the U.S. Sentencing Commission must complete its guidelines. (*The Third Branch* last month reported that such a measure had already passed the House.)

The legislation extended the deadline by which the Commission must report a set of guidelines to Congress to April 1987. In addition, it altered the dates of the sentencing and parole aspects of the Comprehensive Crime Control Act, keeping the Parole Commission in operation for five years from the date the initial sentencing guidelines become effective.

The amendments to the sentencing laws that were to become effective Nov. 1, 1986, will now become effective Nov. 1, 1987.

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Veteran Legislator Praises Judiciary, Shares Perspective on Federal Courts

Congressman Robert W. Kastenmeier (D-Wis.) is Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

After Army service, Congressman Kastenmeier received his law degree from the University of Wisconsin and practiced law in Watertown, Wis., from 1952 to 1958. He also served a three-year stint as a justice of the peace for Jefferson and Dodge Counties (1955–1958). He has represented his district since 1958, 28 continuous years in Congress.

The Subcommittee of which the Congressman is Chairman has legislative and oversight responsibility for the United States court system and for various elements within the Department of Justice. It also has legislative responsibility in several general subject areas, including court reform; corrections and prisons; the financing of legal services; attorneys' fees; alternatives to litigation; patents, trademarks, and copyrights; privacy; and First and Fourth Amendment rights.

Congressman Kastenmeier has sponsored laws enacted into law to reform the magistrates system, to create the U.S. Court of Appeals for the Federal Circuit, to provide bankruptcy reform, to establish a bankruptcy court system, to divide the Fifth Circuit into two separate and autonomous circuits (the Fifth and the Eleventh), and to establish a federal judicial disability and discipline mechanism. He was a sponsor of legislation to create the State Justice Institute.

Cong. Robert W. Kastenmeier

In 1985 the Congressman received the Distinguished Service Award from the National Center for State Courts, the Warren E. Burger Award of the Institute for Court Management, and a distinguished service award from the Association of U.S. Magistrates, all in recognition of his work in improving the administration of justice in federal and state courts.

You were interviewed by *The Third Branch* in June 1979; have the past several years caused you to change your general philosophy about federal courts?

No, indeed not. Today, I very

See KASTENMEIER, page 4

Chief Justice Asks Social Security Change

On Jan. 21, 1986, Chief Justice Burger sent to the Speaker of the House and the President of the Senate proposed remedial legislation to correct an inequity to senior judges in the 1983 Social Security amendments, "which, if left unaltered, could have a grave impact on the federal judiciary's ability to effectively manage its ever-increasing workload," the Chief Justice said.

Since Jan. 1, all 276 senior judges have been subject to a reduction in their retirement salaries through Social Security deductions if they perform any judicial duties. The income reduction for a senior judge who continues to serve has been calculated at between $3,000 and $12,000 annually, depending on a judge's circumstances.

The work of senior judges last year equaled the output of at least 85 active-service judges. ■

Organized Crime Panel Submits Report, Makes Recommendations

The President's Commission on Organized Crime, chaired by Judge Irving R. Kaufman (2nd Cir.), has submitted a report, *The Edge: Organized Crime, Business, and Labor Unions*, to President Reagan and Attorney General Edwin Meese. The Commission earlier issued an interim report entitled *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering*, which recommended measures that, if taken, would curb organized crime's easy access to the financial institutions of the United States.

The second report, released Jan. 14, 1986, examines the problem of labor and management racketeering by organized crime in the United States. The report describes the impact on legitimate businesses of labor-management racketeering schemes, and explains how organized crime, through domination or influence of labor organizations, employers, and businesses, can control segments of entire economic markets and can distort the cost of doing business to marketplace participants through theft, extortion, bribery, price-fixing, fraud, and restraint of trade.

The Commission makes a series of administrative and legislative recommendations in both the civil and criminal law areas, and urges

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Univ. of Nevada Announces Degree Program for State And Federal Trial Judges

The University of Nevada (Reno) announced in January that the University, in conjunction with the National Judicial College, will offer a program leading to a Master of Judicial Studies to active state and federal trial judges who have earned law degrees from an ABA-accredited law school. Justice James Duke Cameron (Sup. Ct. Ariz.), a member of the Board of the Judicial College who designed the program in cooperation with the University, explained that requirements include 24 units of study and submission of a scholarly paper on a previously approved subject.

Though other universities have offered summer programs (including the University of Virginia, where appellate judges may earn a Master of Laws in the Judicial Process), the University of Nevada's advanced degree is the first designed exclusively for trial judges.

Commenting on the new program, Justice Florence Murray, Chairman of the Board of the National Judicial College, said, "It fills a void in the area of continuing education for trial judges. In addition, it affords those trial judges who have been recipients of the largess of the University of Nevada, through their affiliation with the National Judicial College, [an opportunity] to become true alumni of the University. It is another step in the College's continuing efforts to be of service to the judiciary." ■

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Editor

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.

Judges Campbell and Tamm Receive Devitt Award

Judge William J. Campbell

Judge Edward A. Tamm (1906–85)

Judge William J. Campbell and the late Judge Edward A. Tamm have been named as this year's recipients of the highly prestigious Devitt Distinguished Service to Justice Award. Established in 1982, the award is made annually to a federal judge by the West Publishing Company "to bring public recognition to the contributions made by federal judges to the advancement of the cause of justice." Nominations are submitted by members of the legal profession and then considered by a committee of three.

The selection committee members currently are Justice Lewis F. Powell, Jr., of the Supreme Court of the United States, Chief Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit, and Senior Judge Edward J. Devitt of the U.S. District Court for the District of Minnesota.

Senior Judge William J. Campbell, who has 45 years of service to the federal courts, was appointed to the U.S. District Court for the Northern District of Illinois by President Franklin D. Roosevelt in 1940, and became Chief Judge of that court in 1959. He took senior status in 1970, but his service to the federal courts continued. For the past fifteen years, the judge has made significant contributions to the work of the Federal Judicial Center, especially in connection with the Center's programs and workshops. In announcing the award the committee noted, "His long-time direction of national judicial educational programs has enhanced the quality of justice in this country."

An honorarium of $10,000 and a Swedish crystal obelisk especially designed for this award will be presented to Judge Campbell at a ceremony later this year.

Mrs. Edward A. Tamm will receive a like award, which will be made posthumously to the Judge at a special program in Washington next fall.

Judge Tamm, after a distinguished career as Assistant Director of the Federal Bureau of Investigation, was nominated to the U.S. District Court for the District of Columbia by President Harry S Truman in 1948 and to the U.S. Court of Appeals for the District of Columbia Circuit in 1965. His contributions to the work of the Judicial Conference of the United States were many and included the chairmanship of the Conference's Committee on Judicial Ethics. He was the first Chief Judge of the U.S. Emergency Court of Appeals. In announcing his posthumous selection, the committee said: "He was also recognized for establishing and administering a Federal Judiciary Ethics program and for supervising the annual filing of judges' ethics reports."

With 45 years of service by Judge Campbell and 37 by the late Judge Tamm, the aggregate number of years' service to the federal courts totals 82. In short, they have served long and well. ■

Sentencing Commission Staff Director, General Counsel Announced

Kay A. Knapp has been named Staff Director for the U.S. Sentencing Commission. Ms. Knapp is from St. Paul, Minn., and was formerly Research Director and later Director of the Minnesota Sentencing Guidelines Commission (from May 1982 to October 1985). Ms. Knapp has an extensive background in sentencing reform, corrections research, and policy formulation. She completed Ph.D. course work in political science and research methodology at the University of Kentucky and has written extensively on criminal justice and sentencing issues.

Denis J. Hauptly, former Senior Staff Attorney for the U.S. Court of Appeals for the First Circuit, has been named General Counsel for the U.S. Sentencing Commission. His background includes service as Associate Director of the Office of Legislation in the U.S. Department of Justice's Criminal Division, and various staff positions in the U.S. Attorney General's office, including the Office of Policy and Planning and the Office for Improvement in the Administration of Justice. ■

CALENDAR

Mar. 4–7 Video Orientation Seminar for Newly Appointed Magistrates

Mar. 12–13 Judicial Conference of the United States

Mar. 16–19 Sentencing Institute for the Second and Sixth Circuits

Mar. 19–21 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits

Mar. 19–21 Workshop for New Training Coordinators

Mar. 24–26 Conference of Metropolitan District Chief Judges

Apr. 2–4 Workshop for Judges of the Fourth Circuit

Chief Justice Burger Notes Constitution's Bicentennial in Speech to Lawyers

Chief Justice Warren Burger delivered a speech at the American Bar Association midyear meeting, following a 16-year custom. Rather than an "annual report" of the type he has given at past midyear meetings, the Chief Justice spoke instead about constitutional history and the upcoming 200th anniversary of the Constitution. He stressed in the speech "the prominent roles that lawyers played in drafting and securing ratification of the Constitution."

The Chief Justice also announced that the national Commission on the Bicentennial of the Constitution and the American Bar Association have agreed to join in sponsoring a national essay contest on the Constitution for students in more than 40,000 high schools. He also discussed the project *We the People*, a series of television programs to be broadcast over the Public Broadcasting System in 1987, and other ABA programs to trace the historical development of constitutional principles. ■

CRIME, from page 1

improvement in the coordination among government agencies in combating organized crime.

In presenting the report, Judge Kaufman commented that "the most successful law enforcement efforts against organized crime have focused on making it more difficult, costly and dangerous to realize profits from illegal activity. No such effort can be complete without attacking the organized criminal groups who operate in the economic marketplace.

"The combined and coordinated efforts of the private sector and each branch of government can reduce and eventually eliminate the pernicious involvement of racketeers in our economy. . . . If these efforts are successful, a crippling blow will have been dealt to organized crime."

In addition to Judge Kaufman, 17 other persons, including Senator Strom Thurmond and Congressman Peter W. Rodino, serve on the Commission. ■

Supplement to Employment Discrimination Study Published

The Center recently published the second supplement to George Rutherglen's *Major Issues in the Federal Law of Employment Discrimination* (FJC 1983). This 62-page supplement summarizes developments in employment discrimination case law from September 1984 through August 1985. It also contains a bibliography of recent books and articles.

Among the topics discussed are claims of disparate treatment and religious discrimination under Title VII of the Civil Rights Act of 1964, attorneys' fees, and remedies for employment discrimination under the Equal Pay Act and the Age Discrimination in Employment Act.

It is intended that this supplement be used with the original publication and the first supplement, which was published a year ago. However, the table of authorities that appears in this volume is cumulative.

Copies of this supplement may be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (8 oz.), but do not send an envelope.

FJC to Hold Seminar for New Circuit Judges

The Federal Judicial Center will hold an orientation seminar for newly appointed U.S. circuit judges at the Dolley Madison House in Washington, D.C., April 14 through 16.

A reception will be held for the new judges at the Center the evening of April 13.

KASTENMEIER, from page 1

strongly feel that the federal courts, and indeed also the state courts, are doing a good job in terms of federal constitutional and statutory mandates. I say this despite the fact that judges today have increasingly found much greater burdens placed on them. There are more cases and the cases are more complex.

The last interview took place some six and a half years ago, and that is a long time, but my confidence in the judicial branch has stayed the same. I have stated with conviction to the Judicial Conference, that of the three branches of the federal government—the judicial, the legislative, the executive—the judicial branch is held in highest esteem, and I feel that the judiciary has earned that esteem. From a legislative standpoint, I am pleased to try to help the judicial branch cope with a number of challenges that have occurred in recent years, including the massive increases in litigation and in caseloads that confront the judiciary at every level, plus external pressures, including political challenges that have taken place in this period, such as attacks on court jurisdiction and also criticism of the courts about decision-making abilities.

Do you feel judicial activism is prevalent in the federal and state court systems, sometimes beyond what is jurisprudentially acceptable?

It's difficult for me to comment about state courts. State courts by their very nature are different from federal courts and are likely to be at some variance, one from the other. My only comment on state courts is that they tend to mirror judicial experience at the federal level. I believe that state courts are in the process of very substantial improvement in resources, in personnel, and generally in standards and their ability to cope with caseloads and the like.

With respect to the federal system, the term "judicial activism" is one that I'm not very fond of because it has no clear meaning. It is evident to legal scholars that what a judge may be constrained to decide in the year 1985 or 1986 may not have a literal nexus with the Constitution as drafted in 1787. The problems are so different. I would hate to have judges who are required to make decisions think that if they uttered any thought beyond that which appears somewhere else they would be engaging in judicial activism.

I know a few years back it was common to criticize so-called "liberal judges" for judicial activism. The federal courts now in terms of their theoretical political balance certainly are reflective to a considerable extent, at least in terms of sheer numbers, of this Administration, which has five years of appointments. Much of judicial activism therefore may be activism of judges appointed by a conservative President. But I'm not a critic of that.

My own view is that it ill serves us in the Congress or in the executive branch or indeed in the Attorney General's Office to criticize the judiciary as being unacceptably engaged in judicial activism. It does not help us deal with the problems of the judiciary. It does not help the judiciary, and it certainly undercuts, modestly I would hope, public confidence in the judicial branch. To this extent, if there is anything I am a critic of it is using these epithets with respect to the judiciary, particularly the federal judiciary. I would hope that we will have passed that period.

It became a popular subject.

Yes, it was for a while. Actually, I suggested at one point that it came as ill grace for a representative of the Administration, which has been making all the appointments to the judiciary for the last five years and which will have an opportunity for several more years to make such appointments, to be criticizing judges for judicial activism. But I must say that it may be that this is principally the opinion of one cabinet officer. I don't know that his predecessor was quite as critical in that connection. Frankly, such criticism does not help. It does not help the system operate, it does not help public confidence, it does not help respect for the rule of law, to make that sort of charge. The charge has always been ill founded, and I would hope that we are witnessing the end of it at this time.

Do you think federal diversity of citizenship jurisdiction will be eliminated any time soon?

I think so, one day. Maybe not this year or next. I do not feel any longer that there is a substantial differential in the quality of justice that can be rendered by a state trial court or a federal district court, both of which are in the state and draw jury panels from state residents in the normal case. But if I were a practicing lawyer, I would want as many forums as possible—two or more if possible—to litigate in. But I don't consider that to be a reasonable position today, given the question of finite judicial resources.

"Of the three branches of the federal government . . . the judicial branch is held in highest esteem."

While I am not considered a political conservative, I agree basically with conservative thinking on the nature of federalism—that is to say, state issues governed by state law ought to be in state courts and not in the federal courts, whatever the issues are, whether they are tort claims or product liability cases. And federal issues ought to be in federal courts. We had just the opposite not too many years ago. If there was a federal question and it didn't rise to a certain monetary level ($10,000) in controversy, a litigant couldn't necessarily get into a federal court. But if there was a state question involving a state incident and adequate diversity of citizenship, there might be jurisdiction in federal court. It should be just the opposite. The matters that are properly allocated to the states

should be in state court and the matters that are federal should be in federal court. Maybe it's oversimplistic, but it's a guiding principle that I and a number of the members of my subcommittee have followed over the years. In fact, we've convinced the House of this on more than one occasion, but, regrettably, not the Senate.

The state courts have been following the federal courts in many ways—the Victim and Witness Protection Act, for example. Many states now have their own victim and witness protection acts. Is this a trend?

I think it is. Historically, it has been accepted that federal courts may be better forums for many issues than state courts. Some people cite the higher quality of federal judges and the better ability of the federal courts to handle matters expeditiously and fairly. I think the state court systems have worked hard, very consciously, for about a decade, maybe longer, to upgrade their systems. The issue of state-federal disparity always comes up in a discussion concerning the proposed elimination of federal diversity of citizenship jurisdiction. It also has arisen in the context of, for example, the newly created State Justice Institute and other devices which are designed to improve and give uniformity to the states with respect to judicial standards. It is my conviction, however, that the state courts are in the process of improvement and have made enormous strides in the past few years. Growing uniformity between the two systems reflects much of the ease of the federal rules of practice and procedure, improved court management techniques, standards of selection, and the like. Unquestionably, with respect to laws involving procedures for handling litigation, for expediting certain types of cases, the states have borrowed from the federal system. At the same time, in some instances state courts have led the federal system. They very early used alternative dispute resolution mechanisms, such as arbitration. But in other respects, I think state courts have borrowed the best of the federal system. It would not be

Cong. Robert W. Kastenmeier

incorrect to say that cross-fertilization has occurred and both systems—federal and state—have benefited.

You have introduced legislation (H.R. 3378) that would bring new communications technologies—electronic mail, cellular telephones, data and video transmissions—under the Wiretap Act (Omnibus Crime Control and Safe Streets Act of 1968). Why do you believe that legislation is necessary? In your view, has judicial supervision of Title III wiretap orders worked well?

I think judicial supervision has worked well. The history of Title III, starting nearly 18 or 19 years ago, shows that judicial supervision of Title III wiretap orders was a controversial question. Judicial supervision went a long way to establishing some sort of order with respect to the treatment of wiretapping in this country. Today, the problem is that the law just simply is outdated. It is so outmoded that new legislation is absolutely necessary. We are not alone in saying this. This point has been made by, among others, the Office of Technology Assessment and the General Accounting Office.

What has happened is that the use of various new technologies has been tested in the courts. In the absence of statutory guidance, the courts have had to rule on the application of the 1968 law to new technologies. Judges have had to fill in as best they could by construing what ought to be the case, at the same time saying that the Congress ought to update the Act. The Congress, as the policy-making branch, is in a position to delineate statutorily the usage of the new technology in terms of what is appropriately protected as a privacy right and how the government and other outside parties must respond. The courts cannot really do that. Judges can rule on a given legal question but they cannot make policy. Congress alone can do that, and I think we must.

We also must be mindful that in the year 1986 we may not be able to give guidance for more than the next 10 years. Technology tends to be literally outrunning our capacity to anticipate new uses, new rights or impingement upon rights that are not now contemplated, and the relationship of industries, individuals, and the government. Congress must establish a very sensitive and delicate balance among competing interests. Probably we can only do so for a limited period of time, but we must act now at least for the foreseeable future.

You share with the Chief Justice an overriding desire and commitment to improving the correctional system, state and federal, in this country. What, in the political scheme of things, do you envision over the next several years for the correctional system? What effect will the ongoing budget cuts—20 percent in the appropriations available to the Bureau of Prisons—have on the work of those in the correctional field?

I would like to set forth a positive agenda that we could accomplish in the corrections field. Such an agenda would include the Chief Justice's "factories with fences" concept. I'm supportive, as are many others, of his notion that we can make a prison experience, regrettable as it is, somewhat more helpful to the individual and to the institution and to society. Proposals for correctional improvements pale in connection with other

See KASTENMEIER, page 6

KASTENMEIER, from page 5

practical problems that we now face. Some are budgetary, some are societal. Today we have higher numbers of people who are convicted of increasingly violent crimes. The prison system has a very difficult time dealing with these individuals, more difficult, I might say, than existed a generation ago. The profile of individuals incarcerated in maximum security institutions is very poor, by and large, in terms of the potential for those individuals to benefit behaviorally from incarceration. We have, unfortunately, become a more violent society and the correctional system has had to bear the brunt of that change. At the same time, rather than devote more resources to the seemingly intractable problem of how to deal with violent people, we have given up the notion that we are going to treat them and cure them of personality disorders so there will be no recidivism. I agree with Norm Carlson that our major obligation today is to provide humane incarceration for inmates consistent with administrative standards, or court-imposed standards—constitutional standards certainly—and to enable these individuals to have educational, work, and other opportunities if they can be helped.

We are facing cutbacks, and if Gramm-Rudman-Hollings is hard on some government agencies it will be doubly hard on prisons. It will have an enormous, negative impact. There is not very much budgetary flexibility in prisons. One can argue that we have so much committed to defense in terms of dollars that cutbacks in defense can be digested without great difficulty. But in prisons that is not the case. So much of corrections is in personnel, so much of it is in daily care of prisoners. We already have unacceptable overcrowding in most of our institutions in the federal system. And overcrowding is certainly true in the state systems.

We have nowhere to go but down. I say this as a challenge to us in connection with what we can look forward to for the next three or four years. Hopefully, this challenge will inspire us to treat this question somewhat separately, otherwise we will find courts faced with serious prison overcrowding being forced to consider releasing individuals, perhaps putting some individuals out on the streets who ought not be there for the protection of society. We will see the creation of chaotic conditions. In short, we have to have resources to devote to prison systems even if we, as reformers, would love to see people in halfway houses and in programs that did not involve prisons. Because of violence in our society, and because of the intractability of some of the problems, including narcotics-related matters, we will still have to have prisons.

"We have to have resources to devote to prison systems even if we . . . would love to see people in programs that did not involve prisons."

Just to exacerbate the situation, we have perhaps 1,500 to 1,800 Cubans who are being held for immigration purposes in the Atlanta Penitentiary.

There is a trend in corrections that we examined recently in my committee involving privatization of prisons or correctional facilities. I am not clear how privatization can be done at a state or federal level in the era of Gramm-Rudman-Hollings, because the private organizations intend to make money at their endeavor, substituting for what has traditionally been a governmental role. How private enterprise can make money and still deliver at reduced dollars available for corrections, while respecting constitutional and policy standards for incarceration, I do not understand. I'm very skeptical about that. Privatization is one of the few really new ideas that seems to have some currency, and, even though I am a skeptic about it, I'm afraid that it would have a better chance in an era in which we had increased dollars going into corrections.

So I am not optimistic about the next few years except in the sense that I think we will go through a trauma which may enable us thereafter to deal somewhat differently, and, hopefully, more effectively with the question of prisons and corrections in America.

You have been the guiding force behind virtually all of the major judicial reform legislation for a number of years. What motivates your untiring efforts for judicial reform?

My work has been intermittent, since we get other issues that often intervene, so that sometimes I find it hard to continue work on any given piece of legislation. But my feeling is that there is always an unfinished agenda and there always will be. Court improvement has been a goal shared by many—the American Bar Association certainly; the American judiciary, of course; and many others who have devoted themselves to how we can contribute to an improvement in our justice system. I feel I am just one of those persons.

Sometimes improvements are probably not seen as improvements by everyone. I am thinking specifically of judicial tenure and judicial ethics legislation. But I do think that we need public confidence in our institutions and I think in the federal system the judiciary has changed enormously in the last decade or so. It is no longer a single judge whom almost everyone knew serving virtually alone in the district, riding a sort of circuit of his or her own. From a nationwide perspective, the judiciary is essentially more bureaucratic and impersonal and certainly less collegial than it once was. We have seen these changes come about, and we've needed to create impersonal institutional and administrative means of dealing with problems such as complaints about judges. That's where judicial discipline and tenure and ethics come into play and a need for statutory enactment of provisions

See KASTENMEIER, page 8

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Abrahamson, Shirley S. "Redefining Roles: The Victims' Rights Movement." 1985 *Utah Law Review* 517.

Amar, Akhil. "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction." 65 *Boston University Law Review* 205 (1985).

Blackmun, Harry A. "Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?" 60 *New York University Law Review* 1 (1985).

Bork, Robert H. "Law, Morality, and Thomas More." Address to the Thomas More Society of America, Washington, D.C., Sept. 26, 1985.

Brennan, William J., Jr. "Rededication Address: The American Bar Association's Memorial to the Magna Carta." 19 *Loyola of Los Angeles Law Review* 55 (1985).

Cohen, George M. "Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench." 133 *University of Pennsylvania Law Review* 1117 (1985).

Directory of Criminal Justice Issues in the States. Criminal Justice Statistics Association, Washington, D.C.

Edwards, Harry T. "Hopes and Fears for Alternative Dispute Resolution." 21 *Willamette Law Review* 425 (1985).

Edwards, Harry T. "Public Misperceptions Concerning the 'Politics' of Judging: Dispelling Some Myths About the D.C. Circuit." 56 *University of Colorado Law Review* 619 (1985).

Estreicher, Samuel, and John E. Sexton. New York University Supreme Court Project." 59 *New York University Law Review* 677-1929 (1985).

A Framework for Studying the Controversy Concerning the Federal Courts and Federalism. Advisory Commission on Intergovernmental Relations, Washington, D.C. Copies available from the Commission at 1111 20th St., N.W., Washington, D.C. 20575).

Geiselman, R. Edward, and Ronald P. Fisher. "Interviewing Victims and Witnesses of Crime." National Institute of Justice. *Research in Brief.* December 1985.

Gibney, Mark. "The Role of the Judiciary in Alien Admissions " VIII *Boston College International & Comparative Law Review* 41 (1985).

Goldberg, Arthur J. "Stanley Mosk: A Federalist for the 1980's." 12 *Hastings Constitutional Law Quarterly* 395 (1985).

Kaufman, Herbert. *Time, Chance, and Organizations: Natural Selection in a Perilous Environment.* Chatham House, 1985.

Leflar, Robert A. *One Life in the Law.* Arkansas Press, 1985.

1985 Grand and Petit Juror Service in United States District Courts. Administrative Office of the U.S. Courts, 1985.

Parness, Jeffrey A. "Groundless Pleadings and Certifying Attorneys in the Federal Courts." 1985 *Utah Law Review* 325.

Petersilia, Joan, and Susan Turner. *Guideline-Based Justice: The Implications for Racial Minorities.* Rand Publication Series, 1985.

Ranney, James T. "The Exclusionary Rule—The Illusion vs. the Reality." 46 *Montana Law Review* 289 (1985).

Schwartz, Bernard. *The Unpublished Opinions of the Warren Court.* Oxford, 1985.

Shafferman, Joel. "Privacy Plight of Public Employees." 13 *Hofstra Law Review* 189 (1985).

See SOURCE, page 9

Center Publishes New Audiovisual Media Catalog

The Center recently published the *1985 Catalog of Audiovisual Media Programs,* a substantial revision of the former *Educational Media Catalog.* This new edition lists audiocassettes, videocassettes, instructional software, and films available for loan to federal judicial personnel from the media library of the Center's Information Services.

The items are grouped by subject matter and include recordings of Center seminars and workshops, specially produced Center media programs, and programs obtained from commercial sources and other government agencies. Recordings of presentations at seminars are included on a selective basis in an effort to avoid needless duplication and to make the catalog easier to use. The programs were selected for inclusion based on the level of past usage and their topicality.

The introduction to the catalog further describes the organization of the materials listed and includes directions for requesting items and a reproducible request form (which should be retained for recurring use).

Copies of the catalog have been distributed to a large segment of the federal judiciary, including judges, magistrates, clerks, circuit and district executives, chief probation and pretrial services officers, offices of senior staff attorneys and federal public and community defenders, and court training coordinators. Other federal judicial personnel may obtain copies by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (6 oz.), but do not send an envelope. ■

1986 Circuit Judicial Conferences

First Circuit	Oct. 14-16	Dixville Notch, N.H.
Second Circuit	Sept. 4-7	Bolton Landing, N.Y.
Third Circuit	Sept. 28-30	Princeton, N.J.
Fourth Circuit	June 26-28	White Sulphur Springs, W. Va.
Fifth Circuit	May 11-14	Houston, Tex.
Sixth Circuit	May 14-18	Memphis, Tenn.
Seventh Circuit	May 18-20	Milwaukee, Wis.
Eighth Circuit	July 22-28	Minneapolis, Minn.
Ninth Circuit	Aug. 17-21	Sun Valley, Idaho
Tenth Circuit	July 9-12	Boulder, Colo.
Eleventh Circuit	May 11-14	Atlanta, Ga.
D.C. Circuit	May 18-20	Williamsburg, Va.
Federal Circuit	Apr. 23	Washington, D.C.

KASTENMEIER, from page 6

which I think in another time might have been unnecessary.

Are there many others in the House and Senate who are really interested in judicial administration? Are there many interested lawyers or former judges in Congress now?

Strangely enough, I think there are fewer than one would expect. We do have a number of members of the House and the Senate who are either former judges or have been practicing lawyers in the past. One would naturally assume that these people would be keenly interested on a continuing basis in the judiciary. In my opinion, their lack of special interest in judicial administration is because they have other duties. If they are on a committee that deals directly with court reform, they deal with it, but if they are on another committee their other duties sometimes just take them in other directions. There are a number of them who clearly are interested in these questions. You can reawaken a sense of concern about the judiciary in them, but the brunt of work is left to those of us who are directly challenged with the responsibility, as Howell Heflin and Strom Thurmond and many others are in the Senate.

The importance of their other work in the Senate and the House tends to override other matters?

Yes, I think so. If I take a bill to the floor, let's say such as increasing judicial survivors' benefits, it will get general support. Now it means that there is latent, strong support for judges, even though individual members will complain from time to time about judges for various reasons, as they do in any policy-making institution. Yet the support is there, and I think the residual good will and support for the judiciary generally, the federal judiciary certainly, is still notable in the House and Senate. Sometimes we may differ as a matter of policy whether the mandatory jurisdiction of the Supreme Court ought to be eliminated or not, or whether diversity ought to be changed, but basically I think there is support for the judiciary. I have no hesitation about moving legislation forward based on any fear that the House might disapprove because judges might be deemed "unpopular." That is not the case.

Among the bills passed by the House in December was the Rules Enabling Act of 1985 (H.R. 3550), affecting the way in which federal rules become effective. What particular concerns of yours does this measure address?

With respect to the Rules Enabling Act, this too, I think, responds to my own philosophy. Again, we want to be helpful with respect to the Judicial Conference and the standing committees that handle the rules. We were mindful of a number of suggestions and criticisms of the way things have been conducted in the past. We did think that openness, although resisted, I think, at the outset by some members of the judiciary, is desirable, and there is an essential element of openness that we have put into the Act. We've also tried to respond to concerns about the role the Supreme Court would play. We decided as a matter of policy that the Court ought to continue to review rule changes, even though it may not play a highly active role in the rules. The Supreme Court's rule-making role is very important to the state supreme courts in discharging similar responsibility. If the federal rules are to be given a high degree of credibility and followed as a model by the states, then the Supreme Court accomplishes by its rather passive review role an important function when all else is considered.

Again, the bill does not contemplate, hopefully, much of a role for the Congress. I remember some of my colleagues struggling with the rules in the past decade. I would hope that the Congress would again play a very passive role in connection with the rules in terms of approval. I do not want various questions on the rules of evidence or anything else to be politicized. There may be a couple of instances one could imagine that could lead to special legislation, but overall we would be very happy for these rules not to be altered by the Congress.

We do, however, at the same time believe that the rule-making process should not supersede acts of Congress, and that's recognized in the proposed legislation. Although there may have been some earlier question about it, the Judicial Conference has acceded to that point of view, and I think that was important.

"I . . . would always put elimination of the Supreme Court's mandatory jurisdiction and abolishment of diversity jurisdiction on my list of things I would like to see achieved."

Other bills are coming down. Of course, there is the proposed Intercircuit Tribunal, which we will want to look at. We just passed the Judicial Improvements Act, which contained a number of housekeeping changes, including judicial survivors' annuities reform. If one looks at the content of the Judicial Improvements Act from a judiciary perspective, it would have to be considered as a very positive amalgam of different provisions.

I, of course, would always put elimination of the Supreme Court's mandatory jurisdiction and abolishment of diversity jurisdiction on my list of things I would like to see achieved. There is some question whether the Senate cares to move those two matters forward. I would not merely pass them unless a showing is made that there is some interest on the part of the Senate in those matters.

Do political changes in Congress and the resultant changes in commit-

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PERSONNEL

Nominations

Frank J. Magill, U.S. Circuit Judge, 8th Cir., Jan. 21

Ronald R. Lagueux, U.S. District Judge, D.R.I., Jan. 21

Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., Jan. 21

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Jan. 29

Sidney A. Fitzwater, U.S. District Judge, N.D. Tex., Jan. 29

Walter J. Gex III, U.S. District Judge, S.D. Miss., Jan. 29

Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Jan. 29

efferson B. Sessions III, U.S. District Judge, S.D. Ala., Jan. 29

Robert J. Bryan, U.S. District Judge, W.D. Wash., Feb. 3

Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Feb. 3

Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Feb. 3

David R. Hansen, U.S. District Judge, N.D. Iowa, Feb. 3

Appointments

tephen V. Wilson, U.S. District Judge, C.D. Cal., Dec. 6

dward R. Korman, U.S. District Judge, E.D.N.Y., Dec. 16

atrick A. Conmy, U.S. District Judge, D.N.D., Dec. 17

mes L. Buckley, U.S. Circuit Judge, D.C. Cir., Dec. 19

rank X. Altimari, U.S. Circuit Judge, 2d Cir., Dec. 23

lenn L. Archer, Jr., U.S. Circuit Judge, Fed. Cir., Dec. 23

ynn N. Hughes, U.S. District Judge, S.D. Tex., Dec. 23

eorge H. Revercomb, U.S. District Judge, D.D.C., Dec. 24

avid R. Thompson, U.S. Circuit Judge, 9th Cir., Dec. 24

lorris S. Arnold, U.S. District Judge, W.D. Ark., Dec. 30

uross Fitzpatrick, U.S. District Judge, M.D. Ga., Dec. 31

mes L. Ryan, U.S. Circuit Judge, 6th Cir., Jan. 2

obert L. Miller, U.S. District Judge, N.D. Ind., Jan. 10

J. Spencer Letts, U.S. District Judge, C.D. Cal., Jan. 13

Alan B. Johnson, U.S. District Judge, D. Wyo., Jan. 17

Senior Status

Paul Benson, U.S. District Judge, D.N.D., Dec. 31

Morgan Ford, Judge, U.S. Court of International Trade, Dec. 31

Deaths

Anthony T. Augelli, U.S. District Judge, D.N.J., Oct. 22

Roger Robb, U.S. Circuit Judge, D.C. Cir., Dec. 19

Positions Available

Clerk, U.S. Bankruptcy Court for the Middle District of Florida. Salary to $52,262. To apply, send resume by Apr. 15 to Alexander L. Paskay, Chief Judge, U.S. Bankruptcy Court, P.O. Box 1000, Tampa, FL 33601-1000.

* * *

Senior Supervisory Attorney, U.S. Court of Appeals for the Fifth Circuit. Salary to $44,430. Qualifications: three years of high quality legal experience with knowledge of federal practice and procedure; management experience or demonstrated interpersonal skills preferred; graduation in the upper third of law school class; law review or equivalent legal research, writing, and editing experience. To apply, send resume by Mar. 15 to Steven Felsenthal, Director, Staff Attorneys' Office, 600 Camp St., Rm. 116, New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYER

SOURCE, from page 7

Simon, Larry G. "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" 73 *California Law Review* 1480 (1985).

Stern, Barry J. "Presumptive Sentencing in Alaska." *Alaska Law Review*, December 1985, 227-70.

Weninger, Robert A. "Unjustified Sentence Disparity: A Case Study of the Leveling Effect of Parole." 36 *Syracuse Law Review* 715 (1985).

Immigration Talk Begins Ninth Circuit Lecture Program

Professor William Hing recently spoke on immigration issues at a meeting of Ninth Circuit appellate judges who were in San Francisco for court week. Also in attendance were several appellate staff attorneys and law clerks.

Professor Hing, of the Golden Gate University Law School, is a visiting professor at Stanford Law School for the 1985–1986 academic year. His was the first in a series of occasional lectures planned by the Ninth Circuit's education committee and sponsored and financed by the Center as part of its local training program. The law schools have been asked for sug-

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THE BOARD OF THE FEDERAL JUDICIAL CENTER

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Charles W. Nihan, Deputy Director

KASTENMEIER, from page 8

tee chairmen make significant changes in what legislation is passed into law or defeated? For example, there was a push in Congress to bring about more "court stripping"—depriving the courts of their jurisdiction—but it seems to have receded. Do you have any views on this?

Yes. Political changes often occur as winds of change. That is to say, changes do not necessarily mean that personnel—individual House members or Senators—have been replaced. The political winds of change are more important. So, while I cannot say that there have been changes in personnel that affect legislative outcomes, I do feel that during the last two or three years the mood has changed from one of attacking the jurisdiction of the courts, removing jurisdiction from the judiciary, in response to a series of major decisions of the Supreme Court. Court stripping as a political approach has been on the wane. I don't see that pressed any more, and I think that's a very healthy development. In my opinion, we have to come to terms with the function the judicial branch serves in society and that function serves this nation well. Whether or not I agree with every court decision is irrelevant. The judicial branch serves us well and I am very conservative when it comes to institutional changes, such as court stripping, being imposed on the judiciary by the legislative branch. ■

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gestions for prospective speakers and topics.

These programs represent another means to provide judges with an opportunity for dialogue with others who are working in areas closely related to the work of the federal courts. Other circuits interested in developing an occasional speaker series are invited to contact the Center's Division of Continuing Education and Training. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

eaders Gather at Brookings Institution Forum

Last month, following a tradition arted in 1978, the Brookings Insti- tion brought together in Annapo- , Md., leaders from the three anches of the federal government, veral state chief justices, and embers of the academic communi- . Brookings' President Bruce K. acLaury and Senior Staff Member arren Cikins, along with A. Lee itschler, Director of Brookings' nter for Public Policy Education, signed the seminars to "give the rticipants the opportunity to plore together problems and issues the administration of justice on an ormal and off-the-record basis."

Chief Justice Burger explained in welcoming remarks that the meetings afforded the judiciary an opportunity for direct communication with others, especially representatives of the legislative and executive branches, whose activities acutely affect the work of the courts. He expressed the hope that these informal discussions would bring about a better understanding of how joint efforts can improve the delivery of justice in the courts. Also addressing the seminar were Attorney General Edwin Meese III, Senator Strom

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hief Judge Sterrett on Tax Cour: Procedures, ourt as Forum for Large and Small Cases

his month The Third Branch *went to Article I specialized court to interview ef Judge Samuel B. Sterrett of the United es Tax Court.*

he Judge, a native Washingtonian, ived an LL.B. from the University of Vir- a Law School, and a master's degree in tion from New York University Law ol. He served in the United States Army after graduating from the U.S. Merchant rine Academy, in the U.S. Merchant rine. A biographical sketch notes that the e sailed as a second mate on ships in both Atlantic and Pacific Oceans. Quite natu- , his hobby is sailing, and he enjoys golf duck hunting.

he Judge's career is replete with expe- e in tax law areas—private practice in shington, D.C, and New York City; rnment service in the Office of the onal Counsel of Internal Revenue Service lew York City; and appointment to the ed States Tax Court, where he has served nuously since 1968. He has been presi- ally reappointed to two 15-year terms, in 1970 and again in 1985.

n June 1, 1985, his colleagues elected Chief Judge of the Tax Court.

What is the origin of the United States Tax Court?

The origin, or the need for a Tax Court, goes back to the Sixteenth

Chief Judge Sterrett

Amendment and the enactment of the income tax law. The tax laws enacted in 1913 provided in effect that the government could simply

See STERRETT, page 4

Judges' Service on Commission Upheld

The Third Circuit Court of Appeals has held that voluntary service by Article III federal judges on the President's Commission on Organized Crime does not violate the separation of powers doctrine. *In re Scarfo*, No. 85-5539, slip op. (3rd Cir. Feb. 14, 1986).

The U.S. District Court for the District of New Jersey, following *In re Scaduto*, 763 F.2d 1191 (11th Cir. 1985), held that the presence of two members of the federal judiciary on the Commission violated the Constitution, and therefore quashed the Commission's subpoena of Scarfo. The Third Circuit vacated the district court's order and remanded with instructions to enforce the Commission's subpoena. (The Commission is chaired by Judge Irving R. Kaufman (2nd Cir.), and former Supreme Court Justice Potter Stewart served on the Commission until his death in December.) Noting that the work of the Commission is nonjudicial and that the service of judges on it is voluntary, the court declined to follow *Scaduto*, stating that "attention should be on the judge's conduct and not that of those who tendered, but did not impose, the powers....We are not prepared to say that the Constitution prohibits the service of Article III judges on any and all extrajudicial governmental committees or commissions."

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Inside

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Federal Salary Mechanism Modified by Congress ..... p. 3

Center Publishes New Staff Paper

Court-Appointed Experts, a staff paper by Thomas E. Willging, was recently published by the Center.

The author discusses the mechanics of using Federal Rule of Evidence 706 to appoint an expert and to allocate payment of the costs. He also reports cases involving creative, nontestimonial use of experts under a combination of rule 706, Federal Rule of Civil Procedure 53 (special masters), and the inherent powers of the courts. The paper was prepared in response to questions raised by judges concerning what they perceived as the relatively infrequent use of court-appointed experts.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (4 oz.). Please do not send an envelope.

JUDGES, from page 1

Scarfo contended that service on the Commission brands a judge as "pro prosecution," and relied on the *Scaduto* conclusion that Commission activity was detrimental to the notion of judicial impartiality. The Third Circuit's opinion says that while the "appearance of bias" argument advanced by Scarfo is "troubling," it "does not persuade us that the Constitution has been violated. Rather, we conclude that it may be addressed in specific cases by a motion for recusal." ■

THE THIRD BRANCH

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Co-editors

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Thurmond, Chairman of the Senate Judiciary Committee, and Congressman William J. Hughes, Chairman of the House Judiciary Subcommittee on Crime, who brought a message from Congressman Peter Rodino, Jr., Chairman of the House Judiciary Committee.

The Chief Justice expressed his personal appreciation for the attendance of his counterparts from the states, Chief Justice Edward F. Hennessey of the Supreme Judicial Court of Massachusetts, this year's Chairman of the Conference of Chief Justices; Chief Justice Robert F. Stephens of the Supreme Court of Kentucky; and Chief Judge Robert C. Murphy of the Court of Appeals of Maryland.

Chief Judge Murphy introduced Governor Harry Hughes of the host state, who discussed the impact of the 1786 Annapolis convention on the drafting of the U.S. Constitution.

Among the subjects that received special attention during the three-day meeting were the sentencing and bail provisions of the Comprehensive Crime Control Act of 1984, habeas corpus, the federalization of state tort law, mass tort litigation, judicial selection, and the proposed intercircuit panel to assist the Supreme Court of the United States with its growing workload. Professor Daniel J. Meador of the University of Virginia Law School restated his endorsement of the intercircuit panel, and Attorney General Meese has since added his endorsement.

Three chief judges from the federal courts were in attendance, Chief Judges Charles Clark, John C. Godbold, and Donald P. Lay. The Federal Judicial Center and the Administrative Office were represented by their directors, A. Leo Levin and L. Ralph Mecham. ■

1985 Financial Disclosure Statements Due in May

All judicial officers and judicial employees in Grade 16 and above are reminded that they are required to file financial disclosure statements for calendar year 1985 by May 15. This includes those employees who may have worked up to 60 days during 1985.

Annual filings are required by the Ethics in Government Act, 28 U.S.C. app. §§ 301-309 (1982).

Canadian Judicial Centre Project Underway

The Canadian judiciary is currently engaged in setting up the Canadian Judicial Centre. The project was announced by Chief Justice Brian Dickson of the Supreme Court of Canada and Federal Minister of Justice John Crosbie on Nov. 14, 1985. Presently in the conceptual stage, the project is directed by Justice William A. Stevenson of Edmonton, Alberta, who is assisted by a research advisor, Brian Grainger. Justice Stevenson is charged with undertaking a study of needs and resources "with a view to the establishment of permanent educational programs available to all judges and courts in Canada."

Justice Stevenson, a judge for ten years (the last five on the Alberta Court of Appeal), is a past president of the Canadian Institute for the Administration of Justice and a former professor of law. He will canvass and consult with individuals and organizations including the Canadian Judicial Council, the Chief Judges of the Provincial Courts, the Canadian Judges' Conference, the Association of Provincial Court Judges, the Canadian Institute for the Administration of Justice, the Canadian Institute for Advanced Legal Studies, and faculties of law and departments of government in Canadian colleges and universities.

Justice Stephenson and Mr. Grainger recently spent a day at the Federal Judicial Center and met with Director A. Leo Levin and other Center staff to learn how the FJC carries out its continuing education and training programs. ■

ABA's Midyear Meeting Held

Members of the ABA's House of Delegates debated and acted upon several issues of relevance to the federal courts at their recent midyear meeting. Some are listed below.

Tort law. The ABA's 441-member house unanimously rejected an American Medical Association proposal that asked that the ABA join its efforts to bring about changes in the tort law system. The AMA membership contend that malpractice judgments against doctors are excessively high; that the cost of malpractice insurance is excessively high; and that the combination is discouraging doctors from fully carrying out their responsibilities to their profession. The ABA house did acknowledge that the two professions share some common problems related to the tort law area and directed that entities of the ABA immediately set in motion studies that could bring about changes. As a start, it was suggested that ongoing consultations be held with representatives of health care groups, the insurance industry, state and federal governmental agencies, and all other appropriate individuals and organizations, "with the goal of seeking a broader consensus of how more equitably to compensate injured persons." In turning down the AMA proposal, however, the ABA did not close the door to cooperative efforts later, presumably after reports come in from the ABA studies.

The ABA House of Delegates approved a comprehensive report opposing a federal role in the area of medical malpractice and opposed the establishment of limitations on awards that may be realized by successful litigants in malpractice cases.

Intercircuit panel. The ABA house both refused to endorse and voted to oppose legislation that would establish, for an experimental period of time, an intercircuit panel to assist the Supreme Court with its growing caseload. The panel that would be established under the pending congressional bill would screen certain cases brought by parties hoping for review by the Supreme Court of the United States, mainly those cases involving issues where the circuit courts of appeals have handed down split decisions. In a rare house appearance by a Supreme Court justice to address a specific issue, Justice Rehnquist asked for ABA support to cure what he pointed out—as the Chief Justice has in the past—is a serious problem for the Court.

Arbitration. The ABA house approved a resolution to urge Congress to amend title 9 of the United States Code. This change would facilitate appeals to federal courts of appeals from orders of a federal district court that either refused a stay of litigation pending arbitration or denied an application to compel arbitration.

Privatization of prisons and jails. This issue raised much controversy and concern, and following debate it was urged that jurisdictions that are considering privatization not proceed until the complex constitutional, statutory, and contractual issues are developed with great care and study.

Bankruptcy. There was no dissent to a resolution that approved support of pending legislation to bring about priority of federal claims in nonbankruptcy administration. This would bring about conformity with the federal priorities under the Bankruptcy Code.

Grand jury subpoenas. Overwhelming approval came for a resolution to curb the government's use of grand jury subpoenas directed to attorneys whose clients are the subject of investigation by that grand jury. The Criminal Justice Section spoke to this issue, insisting that prior judicial approval should be mandatory where the prosecutor is seeking to compel an attorney-witness to provide evidence concerning a client, thereby removing the attorney-client privilege.

Copies of resolutions on these matters are available by contacting Alice O'Donnell at the Federal Judicial Center. ■

Congress Modifies Federal Pay Mechanism

When the President next delivers recommendations on judicial salaries to Congress, those recommendations will become effective after 30 days unless disapproved within that period by a joint resolution of Congress. Such resolution is subject to presidential veto, and if vetoed would have no legal effect unless the veto were overridden by a two-thirds majority of both the Senate and the House.

Congress modified its procedures for acting on federal salary revision late last year as part of the continuing appropriations resolution enacted at the end of the first session. Under prior law, a negative vote by either house was sufficient to veto the Pres-

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Karen M. Knab New D.C. Circuit Executive

Karen M. Knab has assumed the position of Circuit Executive for the District of Columbia Circuit.

Ms. Knab holds a bachelor's degree from St. Mary's College, University of Notre Dame, and a law degree from the University of Chicago. Her background includes work as Deputy Director of State Courts for the state of Wisconsin, Director of the Family Division of the Superior Court of the District of Columbia, and Director of Administration for the firm of Pepper, Hamilton & Scheetz. She has also served as Staff Attorney for the American Judicature Society and as Director of Corporate and Sales Tax of the Illinois Department of Revenue.

Ms. Knab has lectured for the National Center for State Courts, the D.C. Bar Continuing Legal Education Program, the Illinois Bar Continuing Legal Education Program, and Antioch College's Women and the Law series. She has published articles on various aspects of court management and court administration. ■

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audit a taxpayer's return, make a determination that additional tax was due, and then proceed to collect. Until 1924, the taxpayer had no right to have his or her tax liability judicially determined prior to the time he or she paid the tax. The only remedy was to pay the tax and then sue for

Chief Judge Sterrett

refund in either a U.S. district court or the U.S. Court of Claims. The self-assessment system was sort of a novel experiment, and it was recognized that to be effective, it could not appear to be arbitrary and capricious. So it quickly became obvious that the taxpayer ought to have an opportunity to litigate his or her liability first, and that led to the birth of the Board of Tax Appeals in 1924. The members were presidentially appointed for a term of years. They were considered to be experts in the field, and their exclusive jurisdiction was statutory—namely, to interpret the Internal Revenue Code.

The Tax Section of the American Bar Association, the Treasury, and the congressmen and senators were so pleased by the performance of the Board of Tax Appeals that in 1926 they altered its status so that appeals could no longer be taken to the district courts from the Board of Tax Appeals. The Board of Tax Appeals' decision was made a final one at the trial level. Since 1926 the basic role of the Board of Tax Appeals—soon to become the Tax Court of the United States, and now the United States Tax Court—has never changed. It has never had responsibility for investigative work; it has never had the responsibility for giving advisory opinions. It does not regulate. For over 60 years now, it has taken facts and applied the Internal Revenue Code and other pertinent authority to those facts. It has for over 60 years performed a purely judicial function.

"We historically have had a very effective stipulation process which I think may be the envy of some other courts."

And that's not a fact that is known by all. Now it's true that its technical status has changed over the years. When it was founded in 1924, and continuing into 1926, it was an independent agency in the executive branch of the government. In 1942, Congress changed the name of the Board of Tax Appeals to the Tax Court of the United States and gave each of the individuals, who used to be called "member," the title of judge. Nonetheless, it was still an independent agency in the executive branch of government.

Was there a subsequent change in the court's status?

Yes, in 1969 the court was given Article I status and the power to punish for contempt, along with certain other trappings that one associates with a court, such as the power to enforce subpoenas. Throughout this history there were constant efforts by some people to make the court an Article III court. Actually, a bill passed the House at one time to make it an Article III court. This was even an issue back in the early 1920s when Secretary of the Treasury Mellon came up with the idea for a Board of Tax Appeals. In the early stages nobody knew exactly how well the Board of Tax Appeals was going to perform—after all we'd only had an income tax for less than ten years. Many proposals have come up since then to give the court Article III status. The argument sometimes centers on procedural matters, that is, on who should represent the government in the Tax Court. If we become an Article III court, does that mean the Department of Justice or the U.S. Attorney should assume the responsibility for representing the government?

As I understand it, the Treasury Department thinks that there's too close a relationship between litigation in the Tax Court and tax policy to let it get out of its hands. Treasury ought to be able to determine what policy should be enacted and what policy the IRS ought to press in court, so the argument goes. The Chief Counsel of the IRS is the highest ranking government attorney who appears in the Tax Court, and he also holds the title of an Assistant General Counsel of the Treasury. The General Counsel himself does not involve himself in the litigation details of the Chief Counsel's Office. There also might be a problem of what committee on the Hill would have jurisdiction if the court became an Article III court. It currently comes under the jurisdiction of the Senate Finance and House Ways and Means Committees.

Can you describe the way the United States Tax Court functions today?

If the IRS audits a tax return involving income, estate, gift, and certain excise taxes, and after having audited that return and having discussed the issue with the taxpayer, no agreement can be reached on the amount of taxes due, the IRS will send a so-called statutory notice of deficiency to the taxpayer. The taxpayer then may elect to pay that deficiency and sue for refund in the U.S. District Court or the U.S. Claims Court, or he or she may choose to seek a judicial determination that he or she doesn't owe that amount of money by filing a petition in the Tax Court within 90 days from the date of the notice. That immediately stops

e government from assessing the x. The government cannot collect til we have made a decision—rring the so-called jeopardy assess-nt situation, where the taxpayer ght be fleeing the country or some-ng like that. The government files answer and the case is then at ue.

How are cases assigned to the ges?

Under the Internal Revenue Code taxpayer is entitled to have a case rd as close to his or her place of idence as is reasonably possible. e Tax Court sits in some 80 cities oughout the country, and the tax-er will normally choose the city t is closest to his or her home. ept in extraordinary circumstan-such as the location of witnesses, t is where the case will be tried. w, the clerk's office keeps track of request for place of trial in partic-r cities throughout the country. en the number of cases in the city ifies it, we will schedule a ndar in that city. In large cities h as New York and Los Angeles, t means we will hold court almost e a month.

attorney.

How often do you hear cases en banc?

We virtually never hear cases en banc. In disciplinary matters involving attorneys three judges sit if the issue may result in sanctions.

Can you tell us more about the procedure in the Tax Court?

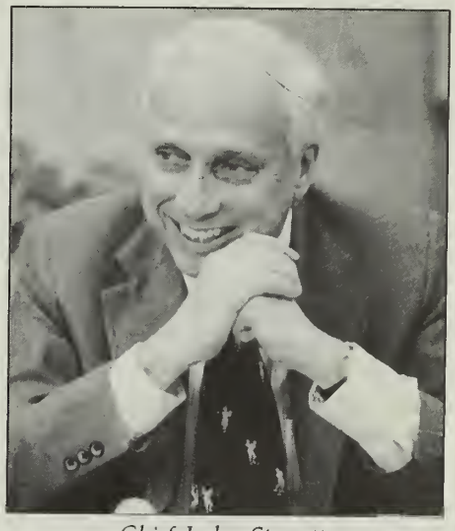
Another raison d'être for the Tax Court is that the decisions be uniform throughout the country—so that the taxpayer in Florida gets the same answer as the taxpayer in California. The idea was that there ought to be a body of uniform judicial interpretation of the Internal Revenue Code.

The way our procedure works is that the Tax Court judge receives the evidence, either at a trial or via a full stipulation of facts, and then requires that the parties file briefs. The judge will examine the evidence, review the briefs, research the question of law presented, and then prepare an opinion which will contain findings of fact and a discussion of the applicable law, concluding with his or her decision. Incidentally, at the trial itself we are bound to follow the Federal Rules of Evidence of the United States District Court for the District of Columbia sitting without a jury.

"Settlements—God bless 'em! If we didn't have settlements we would just be down the tube."

Once the cities are chosen for a rticular term—fall, winter, or ing—the chief judge sends that list und to his colleagues. Each judge old to expect four or five weeks of l in each of three terms. The judge l make his or her selections and ward them to the chief judge, who l make the final decision on who s where. Once a judge is assigned a particular calendar in a city, the ef judge will assign to him or her the cases scheduled for trial on t calendar, and the cases then ome that judge's responsibility. tunately, most cases are settled, where the case is tried, the ernment will be represented by Chief Counsel's Office of the rnal Revenue Service, and the payer normally will have an

To ensure uniformity, the judge sends the proposed opinion to the chief judge for review. Somebody has to read all the opinions to make sure that the 19 of us are consistent. The chief judge reviews the case, and if he finds that it's inconsistent with a decision of ours, say, 10 years ago, he talks to the judge, and the judge says, "I think that decision 10 years ago was wrong." The chief judge says, "That's your prerogative—I'll send it to conference." And then maybe the judge's colleagues will agree with him or her, and we reverse ourselves. But we go to conference, and that's when collegiality becomes so important and when you really get into the true appellate procedure, because the author of the opinion comes in to defend his or her opinion in front of his or her colleagues. Now, just as in the case of an appellate court, the fellow judges around the table will accept, almost without exception, the trial judge's findings of fact. The trial judge heard the evidence, saw the witnesses, and observed their demeanor; but other judges may then say that they think the trial judge did not apply the law correctly. It's debated, and the judges vote on the proposed opinion and can write concurring or dissenting opinions. It's called a court-reviewed case. We think it important to send certain cases to conference because it is our responsibility to be a national court, judicially establishing national standards for interpretation of tax law. We handle about 80 to 85 percent of the tax trial work.



Chief Judge Sterrett

Particularly important cases must go to conference and be considered by the whole court, because there are 19 judges on this court and every one of them is a tax professional. They consider the matter and the opinion goes out with the imprimatur of the full court. There are other reasons that cases go to conference. I cited the one where one of our colleagues wants to overrule a prior case. Another instance would be where on a given issue a U.S. circuit court of appeals

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had reversed us. The next time that same issue comes up in this court, the chief judge must send it to conference to decide whether we will follow that reversal. We will always follow that reversal *in that circuit* because there is no need to make the losing party take a needless appeal. However, as a *national* court, and while certainly respectful of any circuit court's opinion, we do not feel required to follow what one circuit says when deciding a case in another circuit. However, if on reconsideration of the issue we find the reasoning of the circuit court compelling, we are not too proud to reverse ourselves.

Does this fact lead attorneys to practice forum shopping?

Well, of course, the judge would be the last to ever know for a fact, because no lawyer is going to call up and say, "I am not going to your court!" I am sure it exists, but I doubt that it exists a great deal. For one thing, the price that you have to pay to go to the district court and the Claims Court is to pay the tax. And you may not have the money or want to pay the tax. But, on the other hand, if you can afford it and the precedents in the Claims Court, district court, or circuit court are better for your client than ours...then go. I think we would understand why you would do that.

What are the diffferences between regular members of the Tax Court and the special trial judges?

We have on the court both "regular" judges and special trial judges. The regular judges are presidentially appointed, subject to approval by the Senate Finance Committee, and then confirmation by the full Senate. We receive the same salary as U.S. district court judges, and we equate ourselves with U.S. district court judges in most ways. As for the special trial judges, they are selected by the Tax Court. They used to be called commissioners. They were equated at one time with the commissioners of the Court of Claims before the status of that court was changed.

Can you expand on the function of the special trial judges?

The advantage in having special trial judges, and in our being able to pick them, is that we can form a pool of adjudicators, all with a tax background, but with various specialties. It permits the chief judge, in assigning cases, to tailor the special trial judges' particular expertise to the particular issue at hand. They do almost all of the small tax case work, but also are assigned to hear many big, long trials involving complex factual patterns. They are invaluable and make a substantial contribution to the court's work. There are 17 special trial judges, 19 regular judges, and 8 senior judges.

It may become necessary, but at the moment we are not using the special trial judges as magistrates are used in the district courts, that is, to work on the case at an early stage and process it and get it ready for a regular judge. We do not do that at the moment, to any large extent, because so many of our cases wouldn't lend themselves to that sort of procedure.

Please explain the procedure for hearing small tax cases in your court.

There was a real need in this court for an informal proceeding for the small taxpayer, because the court has a dual function to perform. It has the function of deciding the most complicated questions of tax law for the edification of the tax bar and the government—cases involving millions of people or dollars. But it also has the responsibility to the small taxpayer who does not have a great deal of money at issue and who cannot afford to hire an attorney. Congress in its wisdom set up in 1969 a small tax case procedure where the taxpayer may, if the deficiency determined is under $10,000, elect the small tax case procedure—what we call "S cases."

What does that mean?

It means that the taxpayer gets a quick trial. In the large cities, from the time you file your small tax case petition you'll be in trial in six months, and you will get a decision a few months thereafter. In return for all this, there is no appeal by either party from the decision in a small tax case procedure. The S case is an informal trial. It's less costly; there's less

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PERSONNEL

Nominations

J. Daniel Mahoney, U.S. Circuit Judge, 2nd Cir., Feb. 7
Con. G. Cholakis, U.S. District Judge, N.D.N.Y., Feb. 7
Barbara K. Hackett, U.S. District Judge, E.D. Mich., Feb. 11
Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., Feb. 19
Daniel A. Manion, U.S. Circuit Judge, 7th Cir., Feb. 24
Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., Mar. 12

Confirmations

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Mar. 3
Frank J. Magill, U.S. Circuit Judge, 8th Cir., Mar. 3
Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Mar. 3
David R. Hansen, U.S. District Judge, N.D. Iowa, Mar. 3
Ronald R. Lagueux, U.S. District Judge, D.R.I., Mar. 3
Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Mar. 3
Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., Mar. 3
Con. G. Cholakis, U.S. District Judge, N.D.N.Y., Mar. 14
Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Mar. 14

Elevation

C. Arlen Beam, Chief Judge, D. Neb. Jan 7

Deaths

Jean S. Breitenstein, U.S. Circuit Judge, 10th Cir., Jan. 30
Edmund Port, U.S. District Judge N.D.N.Y., Mar. 2
Latham Castle, U.S. Circuit Judge 7th Cir., Mar. 10
Henry J. Friendly, U.S. Circuit Judge 2nd Cir., Mar. 11

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application of rules of evidence where you represent yourself—and most small taxpayers do. It means the judge will involve himself or herself in the trial and ask questions to make sure all the facts that will help the taxpayer are brought out. It evens the scales between the taxpayer and the Chief Counsel's attorney. This is a very, very important part of our task in terms of making the self-assessment system work, because this is the level where most taxpayers are. It's their perception of the system that will determine the ultimate success of the system. We concentrate on trying to make the proceeding fair in reality as well as in appearance. The special trial judges handle almost all the S cases.

Can a nonlawyer represent a taxpayer in the Tax Court?

Yes. We have a proceeding whereby nonlawyers can take an exam and if they pass that exam they can represent taxpayers. The exam is intended to test the applicant's knowledge of court procedures as well as of substantive tax law. The court is on record as opposing a proposal in Congress that enrolled agents and CPAs be automatically allowed to practice in the Tax Court. That would amount to something like over 200,000 additional people entitled to practice before the court. We strongly oppose it. In the first place, enrolled agents are people that the IRS has certified as being qualified to represent a taxpayer in the administrative proceeding. Now it doesn't seem right to us that we should have to take, as an individual authorized to represent a taxpayer, somebody that one side has said knows the law. That means the IRS could pick who's going to represent a taxpayer, not only before it, but before the court, and we don't think that's right. Further, if accountants were allowed to represent taxpayers in the small tax case procedure it would cause the judge instinctively to feel he or she should involve himself or herself less in the proceeding. In other words, "He's got his representative. I should be more impartial in terms of questions I ask." The judge won't feel the obligation to involve himself or herself, to make sure the taxpayer is well represented. We do let the return preparer sit at the table and advise the taxpayer, and he or she could be a witness, so it's not as if the taxpayer is naked, so to speak. The program has been working well. We can cite law review articles by Professor Whitford and others which have said, "This is one small-claims court that works, and if it ain't broke, don't fix it." As an Article I court—a peculiar creature of Congress—we think if Congress is going to hold us accountable then they ought to give us the authority and responsibility to say who's going to represent taxpayers in our court.

Can you generalize on the filings that come to your court? How many involve individuals and how many involve business?

It's about 90 percent personal, 10 percent business. Recently, I found out something interesting. As of June 20, 1924, there were 1,507 civil tax cases pending in the U.S. district courts. In 1985, in U.S. district courts, there were 2,935 cases. In short, it's doubled in the U.S. district courts, but the Tax Court has gone from zero to about 73,000 cases, so I am sure the district courts are grateful for our existence.

A large part of our docket for a while was the so-called tax protester. The "tax protesters," as we use the phrase, are those who say, "The income tax law is unconstitutional."

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New Edition of Court Automation Plan

The 1985 update of the *Five-Year Plan for Automation in the United States Courts* emphasizes the Center's plans for completion of major systems under development and their transfer to the Administrative Office. The plan describes the Center's integrated case management system approach to electronic docketing systems and provides a general description of the new appellate information management system (New AIMS), the bankruptcy automation system (BANCAP), the full-docketing civil case management system (CIVIL), and the probation information management system (PIMS).

The report also summarizes the status of the various automated projects for which the Administrative Office is responsible. These range from developing, installing, and supporting a variety of software projects to procuring and installing decentralized computer systems for use by the courts, to defining future office automation requirements for chambers and support offices, to obtaining telephone and telecommunications networks required by the courts. The report outlines projected expansion plans through fiscal year 1990.

As described in the plan, during the past year, the Center established several training programs required to meet court needs for assistance and instruction in automation preparedness and systems management for this generation of major automated systems. In addition to the intensive training program developed for court-selected system administrators, an analogous management-level course was created to address the particular needs of senior court managers.

The Administrative Office provides training in the use of operational computer applications. Current policies relating to word-processing training and personal-computer training are also spelled out in the plan.

Looking beyond the completion of current major development efforts, the plan makes several projections about future automated support. ■

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"I am a natural being." "I am not subject to taxation." "It violates the Northwest Ordinance." That one sent us all to the history books. What's the Northwest Ordinance got to do with income tax law? Or they say, "We're off the gold standard." All these things are clearly frivolous. In those cases, Congress has authorized us to impose a penalty up to $5,000, and we have been doing it. Those cases are dropping off.

The other big area of our caseload—about 30 percent—is the so-called tax shelter case. These cases have been a management problem, because a shelter might involve investors spread throughout the country. Congress has given us some additional tools to manage those, and while we see some further increase, we think we see the light at the end of the tunnel. In short, we are concerned, but we think that we are going to be able to manage it.

How about settlements?

Settlements—God bless 'em! If we didn't have settlements we would just be down the tube.

Is it a pretty high rate?

Oh, 80 or 85 percent.

That's high. How do you encourage it, or do you?

We send out letters reminding parties that under our rules they are required to get together and stipulate facts. We historically have had a very effective stipulation process, which I think may be the envy of some other courts. We require the parties to get together and stipulate to documents, although they can always reserve the objection of relevancy. By requiring the parties to get together for the stipulation process, you're much more likely to get settlements, because you force the parties to talk to each other, go back and forth, and you force them to look in a mirror and analyze, with at least some degree of objectivity, the real merits of their case.

A number of our judges send out a standing pretrial order which directs the parties to get together and directs them to report to the court before trial.

Can you explain how the AT&T case got in the Tax Court?

I'll use it as an example of an expedited case. A taxpayer has a prerogative of filing a motion for assignment of a judge. The taxpayer also can file a motion for expedited treatment.

The AT&T case is about a distribution of 39 cents per share of Pacific Telesis stock—whether that amount is taxable as a dividend. It affects the three million AT&T shareholders. So both AT&T and the Internal Revenue Service want a judicial determination with respect to the taxable status of the dividend as soon as possible. It was agreed that the parties would file a joint motion requesting that the case be assigned to a judge who would give it expedited treatment.

As I said, the main bulk of cases are assigned to a judge by reason of his or her being assigned to a calendar. Outside that, in order to give special treatment to particularly significant questions of law, we encourage the taxpayers and the government to file a joint motion bringing to our attention the fact that the case is of unusual significance. It might involve, say, the meal money of state troopers, which could aggregate $10 million throughout the country, and thousands of state troopers waiting to find out whether their lunch money is taxable. The court ought to give them a quick answer because if they are wrong, interest is accumulating on the taxes. So the parties file this motion. I, as chief judge, will assign the case to a judge who promises me he or she will put this case at the top of the pile. We want to get an answer well within a year; no more than a year from the time the motion is filed, if the parties have proceeded promptly to trial or to submit the case on stipulated facts.

By judicial standards that is a quick response to a complicated legal question.

Generally our goal is to have a decision a year from the time the case is fully submitted—which means after briefing. Now in these expedited cases, I'm talking about well within a year after the motion was filed. So

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Positions Available

Clerk, U.S. Court of Appeals for the Eleventh Circuit, Atlanta, Georgia. Salary to $61,296. Ten years' administrative experience required (law practice may be substituted for experience; college education and degrees in public, business, or judicial administration and in law may be partially substituted). Send resume by Apr. 23 to Norman E. Zoller, Circuit Executive, U.S. Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Room 416, Atlanta, GA 30303, 404/331-5724 or FTS/242-5724.

* * *

Chief Probation Officer, U.S. District Court for the District of Columbia, Washington, D.C. Commencing Aug. 11. Salary to $61,296. Requirements include four years of experience in a helping profession, with one year of experience as a supervisor; an advanced degree in an appropriate social science is preferred. Send resume by May 15 to LeeAnn Flynn, Administrative Assistant to the Chief Judge, U.S. District Court, 3rd and Constitution Avenue, N.W., Washington, DC 20001

* * *

Clerk, U.S. District Court for the Northern District of Alabama. Salary $61,296. Ten years' administrative experience required (law practice may be substituted for experience; college education and degrees in public, business, or judicial administration and in law may be partially substituted.) Send resume by Apr. 30 to Hon. Sam C. Pointer, Jr., Chief Judge, U.S. District Court, Federal Courthouse, Birmingham, Alabama 35203

EQUAL OPPORTUNITY EMPLOYERS

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here is a substantial difference. Generally speaking, we are in good hape in terms of being current, but ou are never as good as you want to e.

How long has your court experi-ented with the issuance of sum-ary bench decisions?

Congress, as a part of its effort to elp us handle our backlog, gave us ie authority to render bench opin-ns. Prior to that, as a court of ecord, we were required to make ritten findings of fact and write inions. Congress in 1982 autho-zed us to enter bench opinions.

Some cases lend themselves to a ench opinion, cases where issues are mple and factual, and maybe depend on the credibility of witnesses, or luation cases—how much a paint-g is worth, for example. You have listen to the experts and work it it toward X dollars. Some of the otester cases and the cases involv-g an alleged church we can dispose by bench opinions. It saves a great deal of time. In fiscal year 1985, we had 340 bench opinions. It takes a little time for the judge, frankly, to feel comfortable making findings of fact and conclusions of law on the record extemporaneously. My colleagues are getting used to it, and its use will be increased. It's a very valuable tool, and we are grateful to Congress. We are constantly trying to figure out ways to move the 73,000 cases.

One of the ongoing discussions in the legal profession involves a very controversial subject: specialized courts.

I don't feel qualified to say whether or not there ought to be other specialized courts. I'd like to make a point which I don't think is sufficiently understood. While we are labeled a specialized court, federal tax consequences attach to property rights determined under local law, common law, the rules of the state statutes. Taxes are so pervasive and attach to so many different sorts of transactions that we are constantly deciding matters of state law and matters of common law. We have to go back and find out what the word "charitable" meant in the old English common law to interpret section 501(c)(3). People do not fully realize that while the bottom line is interpretation of the Tax Code, to get to that bottom line we have to be broadly based. We have to interpret contracts, divorce settlements, maintenance, child support payments, mineral rights, inheritance laws, and all that. All that is a matter of state law, and we have to get into those questions.

Generally how do you feel about our tax system in this country?

Our tax system needs improvement, I don't think there is any question about that. I think there is a lot of dissatisfaction out there. I think there is a perception among some that the system isn't fair, and when you are relying on a voluntary self-assessment system, the perception of it is very, very important. My colleagues and I believe that it's very important that we make sure that everybody who appears in court sees that he or she is getting his or her fair day in court. This is true particularly with respect to small taypayers, because it may well be the only appearance in court—other than a traffic court—that he or she will ever make. How the taxpayer is treated may very well shape his or her entire attitude toward the judicial system and, indeed, toward the government itself.

Our system must be fairly good, because we've had several countries come to us and try to examine our tax court system. We've got people from Thailand coming over in the near future. They are going to send a couple of judges here to see how our system works. The Canadians have already been to visit us. There have been others. ■

Mandatory Jurisdiction Changes Proposed

Representative Robert W. Kastenmeier (D-Wis.), chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, recently introduced legislation (H.R. 4149) that would substantially eliminate the mandatory jurisdiction of the Supreme Court of the United States.

In introducing the measure on Feb. 6, the Congressman noted that the legislation had passed the House during the 97th and 98th Congresses and enjoys strong support from the judicial and executive branches of government. Quoting from a letter of June 17, 1982, written to him by all nine of the Justices of the Supreme Court, he pointed out that they expressed their "complete support for the proposals."

The bill is favored by the Reagan administration, the Judicial Conference of the United States, and the ABA as well as all of the Justices.

Product-Liability Cases in Federal Courts Increase

"In the decade between 1974 and 1984, the number of product-liability suits in federal courts expanded 680 percent." Time Magazine, Mar. 24, 1986.

CALENDAR

Apr. 2–4 Workshop for Judges of the Fourth Circuit

Apr. 9–11 Seminar for Bankruptcy Judges

Apr. 9–11 Regional Seminar for Federal Public and Community Defenders

Apr. 13–16 Seminar for Newly Appointed Federal Appellate Judges

Apr. 21–22 Judicial Conference Advisory Committee on Civil Rules

Apr. 21–23 Sentencing Institute for the Ninth Circuit

Apr. 23 Judicial Conference of the Federal Circuit

Apr. 29–May 2 Video Orientation Seminar for Newly Appointed Magistrates

Apr. 30–May 2 Seminar for Bankruptcy Judges

Apr. 30–May 2 Juror Utilization and Management Workshop

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Burger, Warren E. "Using Arbitration to Achieve Justice." 40 *The Arbitration Journal* 3 (1985).

Federal Judicial Workload Statistics During the Twelve Month Period Ended September 30, 1985. Administrative Office of the U.S. Courts, 1986.

Flanders, Steven. *United States Courts for the Second Circuit 1985—Report of the Circuit Executive,* 1985.

Jails in America: An Overview of Issues. American Correctional Association, 1985.

Judicial Education—A Guide to State & National Programs. Foundation for Women Judges, 1986.

The Justice Hugo L. Black Centennial Edition. 36 *Alabama Law Review* No. 3 (1985).

Keating, J. Michael, Jr. *Public Ends and Private Means: Accountability Among Private Providers of Public Social Services.* National Institute for Dispute Resolution, 1985.

Keith, Damon J. "Role of the Federal Judiciary." 32 *Federal Bar News & Journal* 409 (1985).

Leval, Pierre N. "From the Bench—Westmoreland v. CBS." 12 *Litigation* 7 (1985).

Markey, Howard T. "The Court of Appeals for the Federal Circuit: Challenge and Opportunity." 34 *American University Law Review* 595 (1985).

Martineau, Robert J., and Patricia A. Davidson. "Frivolous Appeals in the Federal Courts: The Ways of the Circuits." 34 *American University Law Review* 603 (1985).

Redmann, William V. "American Judges in Contemporary Society." 23 *Court Review* 6 (1986).

Rehnquist, William H. "Oral Advocacy." 27 *South Texas Law Review* 289 (1986).

Sessions, William S. "Federal Civil Practice—Where Are We Headed?" 32 *Federal Bar News & Journal* 412 (1985).

"The Supreme Court, 1984 Term." 99 *Harvard Law Review* 1 (1985).

"Symposium: The Burger Court and American Institutions." 60 *Notre Dame Law Review* No. 5 (1985).

Trubatch, Sheldon L. "Informed Judicial Decisionmaking: A Suggestion for a Judicial Office for Understanding Science and Technology." 10 *Columbia Journal of Environmental Law* 255 (1985).

Wick, William A. "Federal Rule of Civil Procedure 68: Proposed Amendments May Impose Liability for Opposing Counsel Fees." 28 *For the Defense* 18 (1986).

SALARIES, from page 3

ident's quadrennial salary recommendations. Those procedures have now been modified, however, in response to the Supreme Court's invalidation of the one-house veto in *INS v. Chadha.*

The Commission on Executive, Legislative, and Judicial Salaries will continue to study and recommend to the President periodic revisions of the federal salary structure. The Commission made no proposals for specific salary adjustment to the President in connection with its review of salaries conducted in fiscal year 1985. However, the law authorizes a one-time Commission review in fiscal year 1987, after which the quadrennial cycle will resume in fiscal year 1989. The 1987 Commission will take office on Oct. 1, 1986, with a deadline of Dec. 15 to report its findings to the President, who would then transmit any recommendations for revised salary levels to Congress in January 1987. There has been no change in procedures governing annual cost-of-living increases. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

VOLUME 18
NUMBER 5
MAY 1986

enneth C. Crawford Retires from FJC

Kenneth C. Crawford

The director of the Center's Division of Continuing Education and Training since 1971, Kenneth C. Crawford, retired as of May 2, 1986.

"Everyone familiar with the Center and its work appreciates Ken's key role in making the Center what it is today," said A. Leo Levin, director of the Center, in announcing Mr. Crawford's retirement. "The federal judicial system owes him an immense debt of gratitude."

Mr. Crawford, while serving as director of the Division of Continuing Education and Training, was instrumental in developing the Center's basic training programs as well as a number of innovations, such as the

See CRAWFORD, page 8

tate Chief Justice Discusses Proposed ederalization of Tort Law, Other Issues

Chief Justice Edward F. Hennessey is ative Bostonian, and his roots are p in the state of Massachusetts. Both law and prelaw degrees are from

Chief Justice Hennessey

rtheastern University, and he en- ed in the private practice of law in ton for 16 years. Service in the ited States Army interrupted the e's career for four years; he was sep- ed from the service in 1945 with the rank of captain and a Bronze Star.

The judge's judicial career started in 1966 on the Massachusetts Superior Court and includes elevation to the Supreme Judicial Court of Massachusetts five years later. Governor Michael Dukakis named him chief justice of the state's highest court in 1976, the position he currently holds.

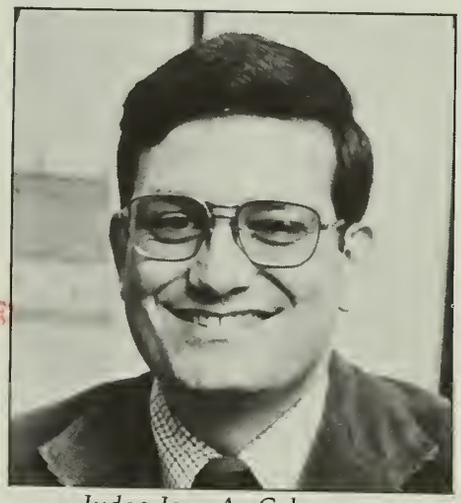
Lecturer, writer, contributor to many activities of bar associations and public service organizations, Chief Justice Hennessey is this year chairman of the prestigious Conference of Chief Justices. The conference embraces a membership of 50 judges who hold the highest judicial rank in their respective states.

In the following interview Chief Justice Hennessey speaks out on many topics of interest to both state and federal judges, and he candidly evaluates many developments in judicial administration as well as the work of the Conference of Chief Justices and how this organization has a direct impact on the courts of this country.

See HENNESSEY, page 4

Judge Jose A. Cabranes Elected to FJC Board

At the March 1986 meeting of the Judicial Conference of the United States, Judge Jose A. Cabranes (D. Conn.) was elected to a four-year term on the Board of the Federal Judicial Center. He replaces Judge Warren K. Urbom (D. Neb.), whose term expired. By statute, FJC Board membership is limited to one term.



Judge Jose A. Cabranes

Judge Cabranes began service as a district judge in December 1979. At the time of his appointment, he was serving as general counsel and director of government relations of Yale University, a position to which he had been appointed in 1975. He practiced in a New York City law firm (1967–71); was an associate professor of law at Rutgers University Law School (1971–73); and served as special counsel to the governor of Puerto Rico and administrator in the Office of the Commonwealth of Puerto Rico, Washington, D.C. (1973–75).

Judge Cabranes is a graduate of Columbia College (A.B.), Yale Law School (J.D.), and Cambridge University (M. Litt. in International Law).

Judge Cabranes has served as public member of the United States

See CABRANES, page 9

Judicial Conference Weighs Budget Cuts

The Balanced Budget and Emergency Deficit Reduction Act of 1985 ("Gramm-Rudman-Hollings") requires that, commencing Mar. 1, 1986, sequestrations of 4.3 percent be made in each appropriation category in the fiscal year 1986 budget, a total sequestration of just over $40,000,000 in the budget of the federal judiciary.

Chief Judge Charles Clark, chairman of the Judicial Conference Committee on the Budget, reported that in response to Gramm-Rudman-Hollings the Chief Justice had directed the budget committee to make recommendations for selective reductions in expenditures in lieu of across-the-board sequestrations. The committee made a series of specific proposals to the executive committee of the conference, including a recommendation that legislation be sought to enable the judiciary to transfer funds between appropriations accounts. Since across-the-board cuts would have a profound disparate effect on personnel needed to support the administration of justice in the various courts, congressional approval was sought to transfer funds from "Salaries of Judges" and "Expenses of Operation and Maintenance of the Courts" to "Salaries of Supporting Personnel." The executive committee adopted a schedule of reductions, which was reaffirmed by the Judicial Conference. Chief Judge Clark emphasized that accomplishment of the fiscal goals set forth in the schedule of reductions cannot be accomplished without a sincere spirit of cooperation on the part of every judicial branch employee in the effort to reduce expenses. Exceptions to the schedule for individual courts must be approved by a special committee appointed by the Chief Justice.

Assuming that Congress confers authority to transfer funds between appropriation accounts, these cuts, together with other savings, will enable the federal judiciary to meet the sequestered amount of just over $40,000,000 required for fiscal year 1986, exclusive of the budgets of the Supreme Court, FJC, Court of Appeals for the Federal Circuit, and Court of International Trade, whose separate budgets have also been reduced by the operation of Gramm-Rudman-Hollings.

Should the supplemental appropriation requests be denied by the Congress or authority to transfer funds between appropriation accounts not be conferred quickly, both furloughs of judicial branch employees without pay and deferral of civil jury trials are possibilities during the last quarter of the fiscal year.

Included in the schedule of reductions reluctantly accepted by the conference was a cut of $1,360,000 in the judiciary's appropriation category of "Court Security," relating to building or perimeter security and equipment. The reduction would be realized by deferring the allocation of 60 additional court security officers authorized for fiscal year 1986; restricting the acquisition, installation, and maintenance of security equipment; and eliminating some court security officer positions. Chief Judge Clark also reported that the U.S. Marshals Service has been directed to absorb a substantial reduction of $6,500,000 in appropriations available for court security in fiscal year 1986. Marshals Service Director Stanley Morris has indicated that this reduction will have its greatest adverse impact on prisoner transportation and courtroom security. The conference unanimously approved a resolution expressing its concern about the impact of these cuts on court security, and authorized transmission of the resolution to representatives of the executive and legislative branches. ■

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Court Upholds Constitutionality of Circuit Investigatory Procedures, Limits Privilege

A specially designated panel of three judges, appointed from outside the Eleventh Circuit, has affirmed that circuit's application of investigatory procedures established by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *Williams v. Mercer*, Nos. 85-2054, 85-5420, slip op. (11th Cir., Feb. 20, 1986).

The opinion disposed of two consolidated proceedings. One of these was an original enforcement proceeding commenced in the court of appeals to enforce subpoenas caused to be issued by the Investigating Committee of the Judicial Council of the Eleventh Circuit. Present and former members of the staff of Judge Alcee L. Hastings (S.D. Fla.) objected to the validity and enforce

See PANEL, page 1

New Information on Circuit Conferences

The U.S. Court of Appeals for the Eighth Circuit will hold its Judicial Conference on July 23–26 in Minneapolis, Minn.

The U.S. Court of Appeals for the Ninth Circuit has changed the dates of its Judicial Conference in Sun Valley, Idaho, from Aug. 17–21 to Aug. 19–22.

udicial Conference Takes Action on Range of Issues Affecting Federal Courts

Although Gramm-Rudman-Hol-ngs and how it affects the federal ourts took up a major part of the udicial Conference's time, other atters also received attention. pon the recommendation of the ommittee on Court Administra-on, the conference acted with re-ect to the following issues:

• **Arbitration.** The conference oted to approve draft legislation bstantively authorizing the pres-t experimental court-ordered arbi-tion program. (The program has en conducted in the past through e process of "authorization by ap-opriation," i.e., through congres-onal funding but without express tutory authorization by the House d Senate Judiciary Committees.)

• **Relocation allowances.** The con-ence approved general guidelines verning the payment of employee ocation allowances. Under the idelines, any employee trans-red to a permanent position in the dicial branch is eligible for ocation allowances, provided that employee agrees in writing to re-in in government service for one ar and that the chief judge of the ceiving court certifies that the nsfer is in the interest of the gov-ment. Noncareer employees such law clerks are generally ineligible relocation allowances upon initial ointment but may be reimbursed relocation expenses incurred as result of a judge's change of offi-duty station during the term of appointment, provided that the ployee signs the one-year service eement. Judicial branch person-, including judges taking senior tus, who relocate primarily for ir own convenience and at their n request may not be reimbursed relocation expenses (5 U.S.C. 724(h)). Staff members required elocate to retain their positions uld be eligible for relocation as-sistance, provided the one-year service agreements are signed.

• **Debt Collection Act.** The conference approved regulations to implement the Debt Collection Act of 1982. The regulations establish a procedure for collection by means of salary offset of debts owed the United States by government employees, including all officers and employees whose salaries are disbursed by the AO, except Article III judges.

• **RICO.** The conference adopted a resolution urging "that the Congress should seriously consider narrowing the reach of" the civil Racketeer Influenced and Corrupt Organizations (RICO) provisions of the Organized Crime Control Act of 1970. The resolution noted in part that the "extraordinary penalties provided by the civil RICO statute [treble damages and attorney fees] are rapidly causing what would formerly have been considered routine breach of contract or common law fraud actions triable only in state courts, in the absence of diversity, to be filed in federal courts. This not only increases the burden on the federal courts, but causes friction with the state court system."

• **Government contract disputes.** The conference approved legislation that has been introduced in both the Senate and House relating to government contract disputes. The legislation would amend 28 U.S.C. §§ 1331 and 1491 to vest exclusive jurisdiction in these cases in the United States Claims Court, thus withdrawing jurisdiction from the district courts. However, the conference directed precatory words to Congress recommending that the legislation make it clear that the amendment to 28 U.S.C. § 1331(b)(2) is intended "solely to defeat district court jurisdiction as to claims against the United States relating to the award of a government contract."

Upon the recommendation of the Committee on the Administration of the Probation System, the conference endorsed legislation pending in Congress to the extent that it would make federal restitution orders nondischargeable in bankruptcy.

Upon the recommendation of the Committee to Implement the Criminal Justice Act, the conference voted to recommend that the act be amended to authorize, but not require, the delegation of a circuit chief judge's authority to approve excess fees to an active circuit judge selected by the chief judge; and to establish a holdover provision to permit the continued service of a federal public defender upon the expiration of the term of office until a successor is appointed or for one year, whichever is earlier.

The Committee on the Administration of the Criminal Law made a recommendation with respect to legislation pending in Congress (S. 1667 and H.R. 3378) that would extend the protections afforded by chapter 19 of title 18, U.S. Code, to advanced forms of electronic commu-

See CONFERENCE, page 10

Senior Judges Exempted from Social Security Tax

Senior federal judges have been permanently exempted by Congress from Social Security taxation, whether or not they perform judicial duties in retirement.

A provision of the Consolidated Omnibus Budget Reconciliation Act of 1986, signed into law on Apr. 7, amends sections of the Social Security Act and the Internal Revenue Code to provide that for the purposes of those sections, the term "wages" shall not include any payment of salary received by a senior federal judge during periods of continued judicial service by designation and assignment.

HENNESSEY, from page 1

In 1984, Congress created the State Justice Institute, but President Reagan has not made his appointments to the Institute's board. It appears that substantial budget cuts may foreclose the Institute from starting its work. Is the Conference of Chief Justices making efforts to see that the Institute starts functioning?

The Conference of Chief Justices is doing all that it can. The present impediment is that the president has *not* made the appointments to the board. This is consistent with his present effort to rescind the fiscal year 1986 funding and oppose the fiscal year 1987 funding. We hope that Congress will approve funds for both years, and we have appeared in congressional hearings to that end. Meanwhile we—the Conference of Chief Justices—and the National Center for State Courts are prepared to assist immediately in all reasonable ways to expedite the starting of the Institute. Of necessity, we are acting in lieu of the board. But the Institute cannot start until the board is appointed, and we are urging the president to make those appointments.

Recently, in appearing before a congressional committee on the funding question, I emphasized that the Institute can be especially useful in funding studies of the critical problems that jointly affect federal and state courts: federal tort law proposals; habeas corpus (especially as it affects state prisoners); and diversity jurisdiction. Presently no organization exists that could bring neutral and informed insight to these issues, which involve billions of dollars. It is a doubtful economy indeed to hold back the $8 million needed for the Institute in fiscal year 1986 and the $9 million requested for fiscal year 1987.

What do you see as the greatest problems of the state courts today?

Image or, in other words, promoting public confidence. This problem is pervasive in its impact. It affects our budgets; it certainly affects judges in terms of their ability and willingness to act with independence, free of unreasonable public and news media pressure. One example: There is constant pressure for more and longer incarcerations in criminal cases. The media, and consequently the public, seem to be unable or unwilling to consider sentencing and the lack of adequate prison capacity as part of the same problem. This is extremely serious; an independent judiciary with a good image is essential to good administration of justice. It is not overstating the matter to say that the nourishment of constitutional principles is at stake. Another unhappy factor as to our image is the public perception of excessive delay in civil cases. Unfortunately, in most jurisdictions the public perceives correctly. But the public does not perceive that the leisurely and litigious approach of some members of the bar is a major influence in excessive delay and excessive cost of litigation.

"[T]he leisurely and litigious approach of some members of the bar is a major influence in excessive delay and excessive cost of litigation."

How do you feel about diversity jurisdiction cases not being handled in the federal courts? Are the state courts equipped to handle such cases in the event federal diversity jurisdiction is abolished?

In all logic these cases should be disposed of in the state courts; only state law is involved. The Conference of Chief Justices has voted that diversity jurisdiction in the federal courts should be abolished. This is by far the majority opinion of the chief justices. However, it is not unanimous. A majority of the chief justices believe their states could not accept the extra burden without a substantial expansion of their judicial resources. A study we requested a few years ago reflected that eight states, including my own, Massachusetts, are in that category. Our Massachusetts trial court of general jurisdiction has more than enough on its plate now. While the number of diversity cases is relatively small compared to the total volume of state cases, they are not evenly distributed, and they tend to be cases that take more court time than the average state case.

During consideration of the State Justice Institute Act in 1984, a Senate report found that state court caseloads had increased partly as a result of federal government actions, among which were recently enacted federal legislation (including the Speedy Trial Act) and U.S. Supreme Court decisions increasing procedural due process requirements in a host of proceedings. Has this trend continued over the last few years, or has it abated somewhat?

PERSONNEL

Nominations

James L. Edmondson, U.S. Circuit Judge, 11th Cir., Mar. 26

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, Mar. 26

Confirmations

J. Daniel Mahoney, U.S. Circuit Judge, 2d Cir., Mar. 27

Barbara K. Hackett, U.S. District Judge, E.D. Mich., Mar. 27

Appointment

Walter J. Gex III, U.S. District Judge, S.D. Miss., Feb. 25

Deaths

D. Dortch Warriner, U.S. District Judge, E.D. Va., Mar. 17

Albert Tate, Jr., U.S. Circuit Judge, 5th Cir., Mar. 27

Without question, state court seloads have increased over the ars, in part because of federal leg- ation and in part because of Su- eme Court decisions that changed e ground rules. We have no statis- al information as to how much of e increase in state court caseloads attributable to these reasons, and n sure nobody else does either. or do we know whether the trend s continued or abated. I would spect that the decisions of the rger Court have not had the same pact on litigation as those of the rren Court, but I would be hard t to prove it.

As you know, of course, if Con- ss were to enact new legislation such pervasive areas as products ility, medical malpractice, and so th, it might well stimulate a flood litigation for some years to come il all the ramifications had been plored. Incidentally, procedural e process decisions of the Su- me Court have probably not had much effect on the volume of liti- ion as have federal legislation l decisions of the Supreme Court he civil rights area.

Has state court concern with beas corpus litigation decreased over the last decade? Can the te-federal judicial councils be pful in dealing with this blem?

While state-federal judicial coun- in some states have helped to n out some local problems be- en the two systems, I believe t the state court concern about eas corpus relating to state pris- rs has not decreased over the last ade, but if anything has been ex- bated. It is still a major irritant n for the public and for state rt judges. The concern is for *fi- ty* consistent with the Constitu- and consistent with fairness. s is reflected by the fact that it inues to receive the attention of Conference of Chief Justices, as enced by conference resolutions pted in 1983, 1984, and 1985. y Congress, not state-federal ju- dicial councils, can effectively deal with the problem. Why Congress does not act is a mystery to me.

Have the chief justices taken up problems related to capital cases at their meetings?

To my knowledge, the Conference of Chief Justices has not taken up problems related to capital cases at its meetings, except as capital cases are prime producers of habeas corpus petitions and except for a program on proportionality review of death sentences at its midwinter meeting in Houston several years ago.

Chief Justice Hennessey

In the federal system there are specialized courts to speed up the processing of cases: the U.S. Claims Court, the Court of International Trade, the Temporary Emergency Court of Appeals. Do you have personal convictions on the use of specialized courts on the state level?

There is no general agreement as to the value of specialized courts versus courts with general jurisdiction. We have some specialized courts in Massachusetts, such as the Housing Court, that work well. A couple of years ago, New Jersey established a new tax court to take over matters previously handled by the Division of Tax Appeals—an administrative agency that had become increasingly backlogged. It is interesting that this was done at the same time New Jersey was eliminating other limited jurisdiction courts such as the Juvenile and Domestic Relations Courts and the County District Courts. A lot depends, I think, on the local situation and where the problems are. As soon as you establish a single trial court of general jurisdiction, people start looking for ways to specialize again. The federal courts are a good example, with the resort to magistrates and bankruptcy judges to free up the time of Article III district court judges. Specialized courts are introduced in any judicial system at the cost of flexibility that permits the interchange of personnel where and as needed.

The Conference of Chief Justices is urging that should an intercircuit panel be created, all state cases be excepted from submission to the panel, thus limiting intercircuit panel cases to those that involve conflicts among the federal circuits. Why is the conference concerned about having the state cases thus handled, since it has not voiced objections to having them in the district courts?

Our policy position is based on the historic fact that only the Supreme Court of the United States can review by direct appeal or certiorari decisions of the highest courts of the states. We do not think it appropriate to alter that relationship in the manner proposed by the intercircuit tribunal. The House Judiciary Committee has agreed with us on this point, and we hope the Senate will go along. Presumably, the principal reason for the tribunal—as illustrated by its name and composition—is to give greater uniformity to the national law through resolution of intercircuit conflicts that the Supreme Court would like to see resolved but does not have time to consider. The tribunal would be composed of revolving panels of judges from the federal circuits, judges who would not otherwise have jurisdiction over state deci-

See HENNESSEY, page 6

HENNESSEY, from page 5

sions. We have no objection to the panel deciding any cases that come to it from the federal courts, even if a state question is involved. But our federal system makes the Supreme Court the only court with direct jurisdiction to review the highest courts of the states, and we want to keep it that way. Federal district courts, it follows, do not directly review state decisions, and the Conference of Chief Justices *does* object to the fact that federal collateral review by habeas corpus is sometimes extended beyond constitutional requirements, and beyond the dictates of fairness and good sense.

Senator Thurmond has introduced legislation on the attorneys' fees issue that evolved from *Pulliam v. Allen*, which held that judicial officers are not immune from attorneys' fees awards. The Judicial Conference of the United States has endorsed the efforts of the Conference of Chief Justices to eliminate what they see as a potential inequity to judges. Would you comment, please?

Support from the Judicial Conference on the critical issue of judicial immunity is a very significant and welcome development in state-federal judicial relations and demonstrates the importance of the work being done by the Subcommittee on Federal-State Relations of the Court Administration Committee of the Judicial Conference. This subcommittee, as you know, was appointed by Chief Justice Burger in 1982 and was the first unit of the Judicial Conference to have state judges in its membership. Thus, when the Conference of Chief Justices passed a resolution urging the Judicial Conference to support legislation protecting state judges against attorneys' fees awards, the issue was referred to the Subcommittee on Federal-State Relations for the initial study and recommendation. You recall, of course, that the Supreme Court based its opinion in *Pulliam* on statutory construction, and said it was for Congress, not the Court, to decide the extent to which state judges should be free from attorneys' fees awards under 42 U.S.C. § 1988. In its response, the subcommittee recommended an amendment to section 1988 that would bar fee awards against a judge "who would be immune from actions for damages arising out of the same act or omission about which complaint is made." This recommendation was approved by the Court Administration Committee and the Judicial Conference. It is the basis for the legislation introduced at the request of the Judicial Conference by Senators Thurmond and Hatch, and will, if enacted, restore the doctrine of judicial immunity to its pre-*Pulliam* state. The Conference of Chief Justices is, of course, delighted to have this very important support. It is invaluable to us in our work with the Congress. I believe that the threat of *Pulliam* judgments is as substantial a threat to judicial independence as we have seen in our time. It is not the monetary risk alone that matters—that can be dealt with to some extent by insurance and by indemnification statutes—it is the threat of judgment itself. Judges simply should not have to look over their shoulders at the prospect of

See HENNESSEY, page 7

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CALENDAR

Apr. 29–May 2 Video Orientation Seminar for Newly Appointed Magistrates

Apr. 30–May 2 Seminar for Bankruptcy Judges

Apr. 30–May 2 Juror Utilization and Management Workshop

May 1–3 Judicial Conference Ad Hoc Committee on American Inns of Court

May 5–8 Video Orientation Seminar for Newly Appointed District Judges

May 11–14 Eleventh Circuit Judicial Conference

May 11–14 Fifth Circuit Judicial Conference

May 13–15 Regional Seminar for Probation Pretrial Officers

May 14–16 Seminar for Training Coordinators of the Eighth Circuit

May 14–18 Sixth Circuit Judicial Conference

May 18–20 D.C. Circuit Judicial Conference

May 18–20 Seventh Circuit Judicial Conference

May 22–23 Seminar for Appellate Conference Attorneys

May 26–28 Judicial Conference Advisory Committee on Bankruptcy Rules

May 27–28 Judicial Conference Subcommittee on Judicial Improvements

May 29 Judicial Conference Ad Hoc Advisory Committee on the Administrative Office

ENNESSEY, from page 6

ersonal liability arising out of their udicial decisions. The principal op-onents of the remedial legislation re civil rights organizations. The rovision for attorneys' fees in civil ights cases is a good one; it encour-ges aggressive enforcement of civil ights against unconstitutional ac-ons of government officials. But as *Pulliam*, the civil rights groups are rong. They express no concern for ne principle of judicial immunity nd thus promote one value at the xpense of an equal or greater value: udicial independence.

While help with the *Pulliam* prob-m is perhaps the most dramatic re-ult of work to date by the Subcom-ittee on Federal-State Relations, it by no means the only one. There so have been important develop-ents in other areas, including law-er discipline, the certification of ate law questions, and the federal les of practice and procedure, hich serve as the de facto rules for any state court systems. Other is-es of common concern are under nsideration, and we look forward a cooperative approach on many ore. There are five federal and four ate judges on the subcommittee, ith Judge S. Hugh Dillin of the uthern District of Indiana as chair-an. State judges on the panel have niformly praised the fine spirit of llegiality that has characterized its ork, as well as the many practical sults. We think it will play an in-easingly important role in improv-g relations between state and fed-al judiciaries and in promoting tional solutions to common oblems.

The September 1985 proceedings the Judicial Conference of the S. read "Rules of practice and ev-ence adopted in the federal sys-n are of significant import for te court systems because of the te use of federal rules as models. order to enhance both federal d state judicial interests, the ief Justice agreed to the commit-tee's recommendation that a representative of the Conference of Chief Justices be named to the Standing Committee on Rules of Practice and Procedure and each of its advisory committees, except the Advisory Committee on Bankruptcy Rules." Have state court judges been appointed to these advisory committees, and, if they have, are they finding this helpful?

As I said, this is another important development resulting from the work of the Judicial Conference's Subcommittee on Federal-State Relations. We are pleased that the Chief Justice has agreed to this recommendation of the subcommittee, as approved by the Court Administration Committee, and that he already has appointed state judges to two of the four advisory committees involved. Experience to date has been too limited to make judgments, but we are confident that this type of cooperation will be useful and that it will prove beneficial to the federal system as well as the state systems.

Eight or more states have some form of sentencing guidelines, and the U.S. Sentencing Commission is at work formulating federal guidelines. In your experience, are state court judges generally favorably disposed toward sentencing guidelines? Do you believe such guidelines answer a public perception that more uniformity and less judicial discretion is needed in the criminal justice area?

My perception is that, among state judges, views are mixed as to sentencing guidelines. I personally support the concept of sentencing according to weighted criteria, under guidelines that have been established according to experience. I have also endorsed in my own state a presumptive sentencing structure within which guidelines can work. My support is conditioned on the necessity that reasonable discretion in sentencing be still left to the judge. This is essential; every case and every offender must be treated individually. There must also be appellate or peer review, at the behest of either government or defendant, if the judge moves outside the guidelines. Guidelines support even-handedness in criminal dispositions; we need this badly. I think judges who oppose all forms of presumptive sentencing and guidelines are shortsighted. Public and media pressure is for more and longer incarcerations. Without guidelines and presumptive sentencing, the danger is that mandatory sentencing legislation will proliferate. I can't say anything good about mandatory sentencing.

"I think judges who oppose all forms of presumptive sentencing and guidelines are shortsighted."

Is the Conference of Chief Justices an effective organization for the exchange of experiences among the state court systems and for the formulation of policy on matters of concern to them?

The answer here, of course, is a definite yes. I mention here the wide-ranging scope of the programs at our annual and midyear meetings as well as some of the more significant issues which the conference has developed and articulated before the Congress and elsewhere as the position of the state courts. A few of these are federal review of state court convictions; judicial immunity, subsequent to the decision in *Pulliam v. Allen;* the Coordinating Council on Lawyer Competence; federal interference in regulation of the legal profession; federal intervention in state tort law, particularly as to products liability; and the State Justice Institute Act. Composed as the conference is of the heads of the judicial branch of government in each of the states, it is the *only* organization that is truly in a position to for-

See HENNESSEY, page 8

HENNESSEY, from page 7

mulate national policies with regard to matters affecting the state judiciaries.

The National Center for State Courts was organized in 1971—almost 15 years ago—following a suggestion made by Chief Justice Burger at the first National Conference on the Judiciary. You are the president of the National Center. Has it lived up to its potential?

The National Center today is indispensable. It is the one organization that the Conference of Chief Justices and the court systems of the 50 states could not do without. It provides invaluable help to the state court systems through its research into problems common to all courts, through its direct expert assistance to individual states and courts, through its training programs in the area of court management, and through its many clearinghouse services. The tangible evidence of this is the fact that its primary financial support comes from voluntary payments by the state court systems.

What is the position of the Conference of Chief Justices as to proposed federal tort legislation, especially in the area of products liability?

The conference is emphatically opposed. Tort law is for the states to develop. The proposed federal legislation would preempt the massive body of state statutory and common law and impose a federal statute. This is an unprecedented extension of the reach of the commerce clause.

The impact of federal legislation in this area would be to get rid of a system of tort law that has taken the states decades to develop and substitute a new statutory scheme that must be interpreted, defined, and applied. It would take a long, long while for any uniformity to arise by dint of cross-precedent on a case-by-case basis in most states.

If we have the federal statute, our confident prediction is that we will have a legal quagmire for many, many years to come. It will be an unholy mess if Congress throws a whole new quick-fix statute at the states.

If the case can be made that substantial tort reform is necessary at this time—by reason of the impact on industry and on the medical profession—it should come in the states. The states can do it with the help of the American Law Institute and the Uniform Law Commissioners, and only in that way are we going to get fair adjustment of the tort law of the country. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Baker, Thomas E. "The *Ambiguous* Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip." 19 *Georgia Law Review* 799 (1985).

"Critical Issues in Tort Law Reform: A Search for Principles." Conference Sponsored by the Program in Civil Liability, Yale Law School. XIV *Journal of Legal Studies* 459–629 (1985).

Kastenmeier, Robert W., and Michael J. Remington. "The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?" 70 *Minnesota Law Review* 417 (1985).

Lambros, Thomas D. "The Alternatives Movement: Rekindling America's Creative Spirit." 1 *Ohio State Journal on Dispute Resolution* 3 (1985).

Marshall, Thurgood. "Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit." 86 *Columbia Law Review* 1 (1986).

Meador, Daniel J. "American Courts in the Bicentennial Decade and Beyond." 55 *Mississippi Law Journal* 1 (1985).

✔ Rehnquist, William H. "The Changing Role of the Supreme Court." Address at Florida State University, Feb. 6, 1986.

Sofaer, Abraham D. "The Political Offense Exception and Terrorism." 24 *The Forum* no. 2, at 1 (1986).

Steinglass, Stephen H. "Wrongful Death Actions and Section 1983." 60 *Indiana Law Journal* 559 (1984–85).

Wallace, Clifford J. "Before State and Federal Courts Clash." 24 *Judges' Journal* 36 (Fall 1985).

Webster, William H. "Sophisticated Surveillance—Intolerable Intrusion or Prudent Protection?" 63 *Washington University Law Quarterly* 351 (1985).

CRAWFORD, from page 1

four-day regional video seminars for newly appointed judges. Mr. Crawford has agreed to continue to make his services available to the Center on a contract basis, Director Levin announced.

Mr. Crawford came to the Center after a distinguished career in the United States Army, rising to the rank of colonel, and including a tour as commandant of the Judge Advocate General's School in Charlottesville, Va. He retired from military service on June 1, 1970, and spent one year as associate director of the Southwestern Legal Foundation in Dallas, Tex., before coming to the Center. His service in the government totals more than 40 years.

He earned a master of arts degree from George Washington University and a doctor of jurisprudence degree from the University of Virginia. In 1970, he was awarded an honorary doctor of laws degree by Illinois College, the institution from which he also received his undergraduate degree. Mr. Crawford is also a graduate of the United States Army War College, the United States Army General Staff and Command College, and the Management Program for Executives at the University of Pittsburgh.

He is the author of several law-related publications and has taught law at universities and colleges in the United States and overseas. He has also lectured throughout the world. ■

Parole Comm'n Begins Special Curfew Program

The U.S. Parole Commission is nplementing an experimental spe-al curfew parole program. The pro-ram advances the parole release ates for certain prisoners on the ondition that, once released, they main in their places of residence uring a specified period of time ch night. Such a condition will rve as a substitute for community eatment center residence for a pe-od of up to 60 days for those pris-ners accepted into the program. e program is designed for prison-s who would qualify for commu-ty treatment center residence but no have acceptable release plans d do not require a center's sup-rt services.

Prisoners meeting the criteria for acement in the program will re-ive a parole certificate that con-ns the special condition that, dur-g a period as long as the first 60 ys of parole, the parolee will re-ain at his place of residence be-een the hours of 9:00 p.m. and 00 a.m. each night unless given vance permission to leave by the obation officer. Further, the pa-ee must maintain a telephone thout a call-forwarding device at e place of residence for this riod.

The special curfew parole program ll provide a significant savings to e Bureau of Prisons, a savings ne-sitated by current budgetary con-aints and deficit reduction legisla-n. The program is a joint effort of e Parole Commission, the Bureau Prisons, and the United States obation Service. ■

BRANES, from page 1

legation to the Belgrade Meeting the Conference on Security and operation in Europe (1977–78) d as consultant to the Secretary of te of the United States (1978). He lso a member of the American w Institute and the Council on eign Relations. ■

Judge William W. Wilkins, Jr., Chairman of Sentencing Commission, Discusses Goals

The Center Advisory Committee on Education Concerning 1984 Crime Legislation, appointed by the Chief Justice and chaired by Judge A. David Mazzone of the District of Massachusetts, met recently with the members of the United States Sentencing Commission. The meeting produced a suggestion that The Third Branch *carry periodic reports on commission activities in order to keep federal judges and supporting personnel informed about the commission's work. This is the first article in that series.*

District Judge William W. Wilkins, Jr., the commission chairman, stated

NEWS FROM THE SENTENCING COMMISSION

recently that, as a prosecutor for six years and now a district judge for five years, he had once been somewhat "skeptical . . . about the idea of federal sentencing guidelines." But his analysis of national federal sentencing data convinced him "of the great need for improvement in the area of sentencing." It is a conviction, he said "that many judges have long shared."

Judge Wilkins discussed the commission and its work at the Brookings Institution's Seminar on the Administration of Justice, held in March in Annapolis.

When defendants with similar characteristics, who committed the same crime, "receive dramatically different sentences due primarily to a single factor—which judge rapped the gavel . . . we should not be surprised by the widespread perception that sentencing is often purely the luck of the draw."

He stressed that "we judges owe it to those we serve, including those we sentence, to better satisfy the basic requirements of justice: certainty, fairness, and, to a much greater extent than has been the practice, equality of treatment of similar defendants who commit similar crimes. Our goal must be justice not only for the defendant, but for the victim of crime, and for society."

When similar defendants who committed similar crimes are incarcerated in the same facility, they "may at some point compare notes on our judicial system. It is not whether they like those who put them behind bars that concerns me—it is whether they can respect the fairness of a judicial system which produces such inexplicable results."

Judge Wilkins recalled Justice Frankfurter's admonition that judicial authority rests ultimately on "public confidence in its moral sanction." "Unwarranted sentencing disparity," Judge Wilkins said, "undermines public confidence in our system. Unwarranted disparity breeds disrespect."

Although the present system may have worked well "in a less complicated age," Congress created the Sentencing Commission because the system "falls short now with more than 550 district judges throughout our nation addressing the complexities of sentencing on an individual basis. In order to ensure fairness and consistency," he said, "sentencing discretion must be better structured."

* * *

The commission's first public hearing was set for Apr. 15 in Washington. The hearing was scheduled to provide the commission various perspectives on its task of ranking the seriousness of federal crimes. The witness list included representatives from the American Civil Liberties Union, the Washington Legal Foundation, and the Association of the Bar of the City of New York. ■

PANEL, from page 2

ment of the subpoenas, which sought the staff members' appearance and the production of certain documents and records.

In the other proceeding, Judge Hastings and two of the subpoenaed staff appealed from a district court judgment that dismissed their action seeking injunctive, declaratory, and other relief against the subpoenas.

The court of appeals rejected the argument that the Constitution's impeachment provisions require that the House of Representatives itself perform all preliminary investigatory functions in deciding whether to impeach. Rather, the investigatory powers that the act assigned to the committee, including subpoena power, are ancillary to the administration of the courts. Further, the investigatory procedures established by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 do not unconstitutionally intrude upon the independence of sitting Article III judges, the court held.

It also held that although a qualified privilege exists between judges and staff in the performance of their judicial duties, it may be overcome absent a showing that the requested documents would reveal communications concerning official judicial business, and in light of the investigatory committee's needs and the general nature of the judge's confidentiality interest. ■

CONFERENCE, from page 3

nications. The conference concurred in the committee's recommendation that in the event of enactment of this legislation, the legislative history make clear that judges would be permitted to authorize magistrates to entertain applications and issue orders approving the installation and use of pen registers and tracking devices.

The Committee on the Operation of the Jury System recommended an updated and shortened model grand jury charge, and the conference approved. Copies of the new model grand jury charge are being transmitted to all chief district court judges. ■

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THE THIRD BRANCH

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JUN 25 1986

Bicentennial Commission to Participate in Philadelphia and Maryland Celebrations

The Commission on the Bicentennial of the U.S. Constitution will join in major programs scheduled in Philadelphia and Maryland in connection with the observance of the 200th anniversary of the signing of the United States Constitution.

Because of the special significance of the bicentennial to Philadelphia, where the Constitution was signed on Sept. 17, 1787, the commission will join Philadelphia's efforts to focus national attention on the Constitution. Two major exhibits, "The Great Fabric of America" and "Miracle at Philadelphia," will open there on Sept. 17, 1986. The "Miracle at Philadelphia" exhibit will be the largest show of objects from the period of the Constitution's signing ever assembled. Philadelphia's yearlong program of activities, called "We the People—200," will culminate Sept. 17, 1987.

The commission will also participate in Maryland's celebration of the 200th anniversary of the Annapolis Convention, and will hold a two-day meeting in Annapolis on Sept. 12–13, 1986, in conjunction with the Maryland celebration.

The Annapolis Convention consisted of a gathering of 12 delegates from five states in September 1786. The action taken by those delegates led to a resolution calling for a national meeting to discuss amendments to the Articles of Confederation. A national meeting was then called by the Continental Congress for May of 1787, and led to the writing of the United States Constitution. The United States Constitution is the oldest written instrument of national government in continuous use in the world.

Legislation is pending in Congress that would make Sept. 17, 1987, a one-time national holiday. Another pending bill would extend the work of the Bicentennial Commission through 1991. ■

Senate Passes Bankruptcy, Annuities Bills

The following bills in Congress are of interest to the judiciary.

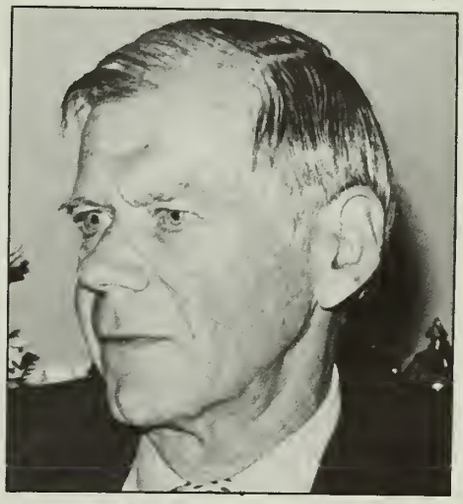
• **Bankruptcy bill.** Legislation to provide additional bankruptcy judges (S. 1923) was considered in the Senate and passed on May 8. As reported by the Senate Judiciary Committee (S. Rep. 99-269), the bill included 34 of the 48 new positions recommended by the Judicial Conference. The bill was amended on the Senate floor to provide a total of 18 additional judgeships, including all of the Conference's recommendations and one additional position for the Western District of North Carolina. No action has yet been scheduled on either of the House bills on bankruptcy judgeships (H.R. 2128 and H.R. 4140).

During Senate consideration of the bankruptcy judgeship bill, an amendment was adopted that would make permanent the pilot U.S. trustee program, under the Department of Justice, for the administration of bankruptcy estates. The amendment essentially incorporates the provisions of S. 1961, which was the subject of hearings on Mar. 25. One important change is a provision that would permit individual judicial districts to opt out of the U.S. trustee program. In districts exercising this option, estates would be administered under a system of court-appointed officers established by the Judicial Conference. Hearings were held on Mar. 20 on companion House bills (H.R. 2660 and H.R.

See LEGISLATION, page 9

Sixth Circuit Chief Recalls History, Wants More Experimentation

The Honorable Pierce Lively, chief judge of the U.S. Court of Appeals for the Sixth Circuit since 1983, was born in Louisville, Ky., and received his A.B. degree from Centre College of Kentucky at Maysville. Following service in the U.S. Navy during World War II, the judge earned an LL.B. at the University of Virginia. He practiced law in Danville, Ky., from 1949 until appointed to the Sixth Circuit in 1972. A member of the Judicial Conference of the United States, Judge Lively is currently chairman of the Conference's Advisory Committee on Appellate Rules.



Chief Judge Lively

Your circuit includes both northern cities such as Detroit and southern cities such as Louisville, so you were required to hear school desegregation cases originating in both parts of the country. Were there any unexpected developments during the years those cases were being litigated?

Of course, we were not the leaders in the southern cases; the old Fifth and the Fourth Circuit implemented *Brown v. Board of Education*. We had significant cases from

See LIVELY, page 4

New FJC Study Available on Settlement Strategies

The Center recently published *Settlement Strategies for Federal District Judges*, by D. Marie Provine, who completed this study while serving as a judicial fellow in the Center's Research Division. The report describes different techniques for settlement, such as judicial mediation, court-annexed arbitration, the use of special masters, summary jury trials, minitrials, and magistrate-hosted settlement conferences. It utilizes information and insights exchanged in the course of a special conference that brought together a group of experienced judges who, collectively, offered a rich experience with varying types of judicial involvement in settlement. It also draws on literature in the field and on personal interviews. The report analyzes the settlement-oriented options available so as to provide a framework that will enable judges to consider settlement strategies they may wish to apply in their courts.

Dr. Provine is associate professor of political science at the Maxwell School of Citizenship and Public Affairs, Syracuse University.

Copies of this report can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (8 oz.). Please do not send an envelope.

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

New and Amended Federal Rules of Appellate Procedure Before Congress for Review

Three new Federal Rules of Appellate Procedure, and several amendments to existing appellate rules, have been adopted by the Supreme Court and on Mar. 10, 1986, were transmitted to Congress by the Chief Justice. The new rules and the amendments will take effect July 1, 1986, absent congressional action.

New rule 3.1 concerns appeals pursuant to 28 U.S.C. § 636(c)(3) from judgments entered by magistrates in civil cases. New rule 5.1 specifies the procedures for appeals by permission under 28 U.S.C. § 636(c)(5) of district court judgments entered after an appeal pursuant to 28 U.S.C. § 636(c)(4) from a judgment entered upon direction of a magistrate in a civil case. New rule 15.1 relates to briefs and oral arguments in NLRB proceedings.

In accordance with a request from the Supreme Court that gender-specific language be eliminated from the appellate rules, the Advisory Committee on Appellate Rules amended other appellate rules as necessary. As to these rules, the Judicial Conference Committee on Rules of Practice and Procedure reported that "these proposed amendments are merely stylistic and no substantive change is intended." ■

PERSONNEL

Nominations

Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., Apr. 8
Patricia C. Fawsett, U.S. District Judge, M.D. Fla., Apr. 9
Alan E. Norris, U.S. Circuit Judge, 6th Cir., Apr. 22
John G. Davies, U.S. District Judge, C.D. Cal., Apr. 22
David Hittner, U.S. District Judge, S.D. Tex., Apr. 22
Douglas P. Woodlock, U.S. District Judge, D. Mass., Apr. 22

Confirmations

Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., Apr. 23
Robert J. Bryan, U.S. District Judge, W.D. Wash., Apr. 24
James L. Edmondson, U.S. Circuit Judge, 11th Cir., Apr. 29

Appointments

Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Mar. 6
David R. Hansen, U.S. District Judge, N.D. Iowa, Mar. 11
Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Mar. 21
Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Mar. 27
Frank J. Magill, U.S. Circuit Judge, 8th Cir., Apr. 1
Barbara K. Hackett, U.S. District Judge, E.D. Mich., Apr. 7
Sidney A. Fitzwater, U.S. District Judge, N.D. Tex., Apr. 21

Elevations

Alexander Harvey II, Chief Judge, D. Md., Mar. 1
Philip Pratt, Chief Judge, E.D. Mich., Mar. 2
Douglas W. Hillman, Chief Judge, W.D. Mich., Apr. 17

Resignation

Emory M. Sneeden, U.S. Circuit Judge, 4th Cir., Mar. 1

Senior Status

Nicholas J. Walinski, U.S. District Judge, N.D. Ohio, Dec. 1
Barrington D. Parker, U.S. District Judge, D.D.C., Dec. 19

Deaths

Edward J. Dimock, U.S. District Judge, S.D.N.Y., Mar. 17
R. Dorsey Watkins, U.S. District Judge, D. Md., Mar. 19
Richmond B. Keech, U.S. District Judge, D.D.C., Apr. 13
Lindsay Almond, U.S. Circuit Judge, Fed. Cir., Apr. 14
William E. Doyle, U.S. Circuit Judge, 10th Cir., May 2

Witnesses Differ at Hearing on Federal Sentencing Guidelines

This is one in a series of articles to p federal judges and supporting per- nnel informed about the commission's rk.

Hearings on offense seriousness. tnesses at the Sentencing Com- ssion's first public hearing on r. 15 expressed a wide diversity opinion on offense seriousness d how it might be measured.

n opening the hearing, commis- n Chairman William W. Wilkins, asked the witnesses, "What is it ut a particular crime, the way in ich it was committed, and its im- t on others that should be con- ered by this commission in writ- guidelines?"

he commission's statutory man- e directs it to consider whether

NEWS FROM THE SENTENCING COMMISSION

eral specified factors have rele- ce to the type of sentence served to take them into account "only he extent that they do have rele- ce." Three of the factors specifi- y mentioned in the statute are nature and degree of the harm sed by the offense," "the com- nity view of the gravity of the of- e," and "the public concern gen- ed by the offense." 28 U.S.C. 4(c).

t the hearing, the National Rifle ociation, for example, called for ift and certain punishment for ous, violent and dangerous ed criminals, but ... a policy of ency for technical, paperwork *malum prohibitum* violations of regarding firearms acquisition, sfer, transportation and disposi- among the generally honest gun ers of this country."

witness for the American Civil rties Union disagreed with the that "the common street crimi- nal or the person who commits one illegal act motivated by a real or perceived need, emotional, financial or political, is a serious threat to society .... On the other hand," he said, "I consider economic criminals, corporate lawlessness and official corruption to be most threatening to our society."

At the hearing, Chairman Wilkins noted that "the severity of the sanction imposed should reflect the seriousness of the criminal conduct involved," and that the commission "must not only formulate appropriate sentences for the criminal conduct involved, but ... must also formulate sentences which are rational and explainable." The resulting system "must articulate to judges who impose sentences, to victims who suffer crimes, to defendants who receive punishments and to the American public why a particular sentence is appropriate," he said.

The commission invites comment on its work from judges, supporting personnel, and all other interested persons. Correspondence may be mailed to the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, DC 20004. The commission can also be reached at 202/662-8800. ■

Center Publishes Research Report on Punishments for Federal Crimes

The Center has completed a research report that presents data on punishments imposed on persons convicted of federal crimes. In determining the punishments, the study took account not only of the sentences imposed by judges but also of the operation of the parole system and the "good time" statute. The report was prepared to provide the U.S. Sentencing Commission with information about current practice that can be used to provide reference points in commission deliberations.

The information is based on 39,304 offenders sentenced between January 1984 and February 1985. For offenders within the jurisdiction of the Parole Commission, the initial parole decision was used to estimate the time that would actually be served. Where no initial parole decision was available, the parole decision was estimated. An estimate of good time was also made for each offender sentenced to imprisonment.

The report comprises 1,279 pages; except for a 37-page introduction that describes purposes and methodology, it consists entirely of 276 tables and 275 graphs showing the punishments for various offense/offender groups. It is the first study to use information from the Federal Probation Sentencing and Supervision Information System (FPSSIS), which was inaugurated by the Administrative Office in 1983 and provides data previously unavailable about the characteristics of offenses and offenders.

The report, entitled *Punishments Imposed on Federal Offenders,* was prepared by Anthony Partridge, Patricia A. Lombard, and Barbara Meierhoefer of the Center's Research Division. Because of its bulk and the probable limited interest in much of the detailed data, it has been reproduced in very limited quantity. An abridged version, however, consisting of the introduction and an illustrative set of tables and graphs, has been printed under the title *Punishments for Federal Crimes,* and may be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (12 oz.), but do not send an envelope.

The full report may be inspected at the Center's Information Services Office. A limited number of copies are also available for loan to federal court personnel and for interlibrary loan. The report is also being published privately; those interested should write William S. Hein, Hein & Co., 1285 Main St., Buffalo, NY 14209.

LIVELY, from page 1

Nashville, Memphis, and Louisville but they were not early enough to break much ground. I suppose the most unexpected development was the difficulty that we had with remedies. There was no question of violation in cases from Kentucky and Tennessee; since state law required dual school systems, the violation was established as a matter of law. All we were concerned with was remedy, and to a large extent our dealing with the southern cases concerned itself with determining either whether a voluntarily accepted plan of desegregation went far enough or whether a court-imposed plan went too far.

It was quite a different story, of course, in the cases from our two northern states. Michigan and Ohio outlawed segregation in their public schools many years ago, so the first battle was over whether there were violations in the school systems. Most school systems in those states resisted this first determination. Once it was determined that there had been an equal protection violation in a particular school system we got into the same sort of thing that we had experienced earlier in the southern school cases—finding a suitable remedy.

It is interesting that you mention Louisville and Detroit because an unexpected development did involve those two school systems. We approved a desegregation plan for Louisville that had the effect of requiring the Louisville Independent School District and the Jefferson County, Ky., school system to merge. They were independent by law, but the plan would only work if the two were actually merged. They did merge and are merged today. While we were working on the Louisville problem, the Detroit case came up to us. The judge there had said, "Well, Detroit is so rapidly becoming a majority black city that there's really no feasible way to desegregate the Detroit school system without bringing in some white school systems." So in the Detroit case we approved a desegregation plan that could have involved exchanging pupils from 53 neighboring suburban school districts with students from the Detroit school system in order to achieve a racial balance in the schools. The Supreme Court held that this was not permitted, because the plaintiffs in the Detroit case had not proved that any of the suburban school districts were deliberately segregated or that their practices had contributed significantly to the problem of Detroit's rapidly becoming a one-race school system. It is interesting because on the surface the two remedies looked so similar, and yet the Supreme Court permitted the Louisville remedy to stand and reversed our court on the Detroit one. The difference, of course, is that both school systems involved in the Louisville case had been segregated by law before 1954.

You have testified before the Senate Judiciary Committee on the impact of Social Security cases on the court caseload. Can you comment on the volume of such cases in your circuit and the effect it has on court management?

First, I would like to say that my interest in the subject really began with a January 1977 Department of Justice report called *The Needs of Federal Courts*. Attorney General Edward Levi appointed a committee

See LIVELY, page 5

Speech by Judge Devitt Available from Center

Your Honor, a brief address that Senior Judge Edward J. Devitt (D. Minn.) has given at FJC seminars as advice for newly appointed district judges, is now available as a Center publication. To obtain a copy, write to the Center's Information Services, 1520 H St., N.W., Washington DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz.). Please do not send an envelope.

CALENDAR

June 2–4 Regional Seminar for Probation Officers

June 9–10 Judicial Conference Subcommittee on Judicial Statistics

June 10–12 Regional Seminar for Probation Officers

June 10–12 Workshop for Training Coordinators of the Eighth Circuit

June 12–13 Judicial Conference Advisory Committee on Criminal Rules

June 12–13 Judicial Conference Subcommittee on Supporting Personnel

June 16–17 Judicial Conference Subcommittee on Federal Jurisdiction

June 16–17 Judicial Conference Subcommittee on Federal-State Relations

June 16–20 Seminar on "Constitutional Adjudication and the Judicial Process in the Federal Courts"

June 18–19 Judicial Conference Committee to Implement the Criminal Justice Act

June 18–20 Seminar for Magistrates of the Fifth and Eleventh Circuits

June 19–20 Judicial Conference Committee on the Administration of the Bankruptcy System

June 23–24 Judicial Conference Committee on the Judicial Branch

June 26–28 Fourth Circuit Judicial Conference

June 30–July 1 Judicial Conference Committee on the Administration of the Criminal Law

June 30–July 1 Judicial Conference Committee on the Administration of the Magistrates System

VELY, from page 4

look into the problems of the fed-
al courts and to prescribe some
nedies. Then Solicitor General,
w Circuit Judge, Robert H. Bork
s chairman of that committee,
ich published a very fine analysis
the problems of the federal
urts. Among its recommendations
s the establishment of a new sys-
n of tribunals to handle some of
litigation traditionally included
the work of Article III courts. The
mmittee spoke specifically of a
cial court, probably to be estab-
ed under Article I of the Consti-
ion, to handle such matters as So-
Security cases. A number of bills
e been introduced in Congress to
ate such a court, and the Judicial
nference of the United States has
dorsed the creation of this court,
to date no legislation has been
pted. I was pleased to note in
New York Times in March that the
tice Department is apparently
v prepared to support once again
creation of such a court.

Getting back to your original ques-
, in 1985 there were 18,225 Social
urity cases filed in the district
rts of the United States. Approxi-
ely 24 percent of these, or 4,347,
e filed in the district courts of the
th Circuit. In 1985 there were
5 appeals of Social Security cases

"[I]n the Social Security appeal ... we are not using our judicial resources very wisely."

n district courts to courts of ap-
s throughout the nation. Three
dred one of these, or approxi-
ely 25 percent of the national to-
were filed in the United States
rt of Appeals for the Sixth Cir-
. These appeals constituted 11
ent of our court's civil docket.

Then you examine carefully what
volved in the Social Security ap-
, it becomes clear, to me at least,
we are not using our judicial re-
ces very wisely. These are disa-
y cases. Most of these cases are heard by an administrative law judge; they are reviewed by an appeals council within the Social Security Administration, and that results in a decision of the secretary. The disappointed claimant can then file an action in the district court, and in most cases the record is referred to a magistrate who studies the administrative record. There is no new hearing after the administrative law judge's action. The magistrate makes a recommendation, and the district judge is required to review that same administrative record de novo before either accepting or rejecting the magistrate's recommendations. This is all done on cross-motions for summary judgment. If the answer is still "no benefits," the claimant may appeal to the court of appeals for his or her circuit. Three judges then are required to read the same administrative record, and in some cases hear oral argument. In most cases, the only question from the time the proceedings end in the Social Security Administration is whether the decision is supported by substantial evidence. All of the judges are merely reviewing factual matters, and a very large portion of each record consists of medical proof.

It seems to me that a special court could quickly acquire some expertise in this field. I don't denigrate the importance of Social Security cases to the litigants; like all cases, they are the most impotant thing in the world to the parties involved. But I do think the claimants would get much faster answers in a special court than they now do, being required to take their turn on the crowded district court and courts of appeals dockets. I believe if an Article I court were established to hear these cases, ordinarily there should be no appeal beyond that court. If a bona fide issue of statutory construction or constitutionality were raised, however, there could be an appeal to a court of appeals to determine those legal questions. But there should be no further review of the record for substantial evidence, no third-layer review of that issue by three appellate judges.

"I don't think you would take anything away from the Social Security claimant by creating [a] specialized court."

So parties in Social Security cases don't stipulate?

No, they seldom stipulate to anything. The claimant has medical proof, and the secretary often sends the claimant to a medical consultant, who frequently disagrees with the claimant's doctor. To have four

See LIVELY, page 6

Paper by Judge Hunter Published by FJC

The Center recently published *The Judicial Conference and Its Committee on Court Administration*, an 18-page paper based on a presentation by Judge Elmo B. Hunter (W.D. Mo.), in his capacity as chairman of the committee, to the Conference of Metropolitan District Chief Judges in October 1985.

Judge Hunter provides a brief history of the administrative structure of the federal courts and the origins of the Judicial Conference of the United States. He also describes the current committee structure of the Conference, emphasizing the Committee on Court Administration and its subcommittees.

A copy of this publication can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz.). Please do not send an envelope.

LIVELY, from page 5

United States judges reviewing issues that are purely factual seems to me a waste of resources. I don't think you would take anything away from the Social Security claimant by creating this specialized court.

Your circuit covers four states; you have 15 judgeships on the Court of Appeals for the Sixth Circuit; and there are 56 district court judgeships. Do you make a point of visiting these jurisdictions regularly?

Our circuit covers Ohio, Michigan, Kentucky, and Tennessee. Let me describe the circuit to you in the words of the late Justice Potter Stewart: "The Sixth Federal Judicial Circuit is a cross-section of the nation, extending from the tip of Michigan's upper peninsula to the Mississippi border. It straddles the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of national life." That was an introduction to a speech that Justice Stewart made some years ago when he was our circuit justice. We think it describes the Sixth Circuit quite well.

Do I make a point of visiting the districts regularly? I don't have a schedule, but I accept invitations to the various cities in our four states to judge moot courts and speak to bar associations and judges' groups. I always try to see the judges while I am there, but our circuit executive keeps up the regular contact with the district courts more than I do.

Chief Judge Lively

How are your panels chosen, and who makes up the list?

We have fifteen active judges, and the court is now divided into three divisions. Each division has five active judges. The court sits to hear arguments thirty-six weeks each year, and each time the court is in session one of these divisions is sitting. A senior judge or a district judge joins the five active judges, and thus we have two panels each session. Both panels sit Monday, Tuesday, Thursday, and Friday. Each panel hears twenty argued cases and eight cases on briefs in those four days. They use Wednesdays for motion practice to try to keep abreast of the inundation of motions that all courts of appeals are now experiencing.

The panels are selected through a computer-assisted program, operated by our circuit executive. Judges are assigned to a division of the court for six months at a time, and every six months these divisions are scrambled. The same three judges sit as a panel all four days of the week. Each judge on our court sits twelve weeks a year, hearing twenty argued cases, and deciding eight cases on briefs. Thus, each judge sits on 240 argued cases and 96 cases on briefs for a total of 336 per year. That is the normal load, not counting motions, emergencies, or en banc hearings and rehearings.

Your court was confronted with the issue of the constitutionality of applying certain law enforcement "profiles" used to detect suspected drug couriers in airports. Can you briefly explain this line of cases?

Yes, we were often invited to rule on the validity of a so-called drug courier profile. It was argued that the profile provides probable cause for arrest of a person suspected of carrying contraband drugs. We never did hold that the profile alone provides probable cause. However, on several occasions our court has held that various factors included in the profile might raise a reasonable suspicion sufficient to support a limited *Terry*-type stop, which is a temporary investigative detention. Most of our airport-stop cases concern one or both of the following issues: First, whether a person stopped for ques-

See LIVELY, page 7

Positions Available

Judge, U.S. Bankruptcy Court, Northern District of Texas. Salary to $68,400; 14-year appointment. Persons with law degrees whose character, experience, ability, and impartiality qualify them to serve in the federal judiciary may request applications from Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130.

* * *

Circuit Executive, U.S. Court of Appeals for the Eighth Circuit. Salary to $68,000. Background in court administration essential. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. To assure consideration, application must be received by June 25. Apply to Chief Judge Donald P. Lay, U.S. Court of Appeals, P.O. Box 75908, St. Paul, MN 55175.

EQUAL OPPORTUNITY EMPLOYERS

Workload Statistics Released by AO

The Administrative Office has released the *Federal Judicial Workload Statistics* report on the business of the federal courts for the 12-month period ended Dec. 31, 1985.

Requests for the report should be directed to the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, Washington, DC 20544.

IVELY, from page 6

oning by officers—and perhaps ter requested to accompany offi- ers to some area other than the ublic area of the airport—was seized" within the meaning of the ourth Amendment, and second, hether the consent of a person so opped was in fact voluntarily ven. The ultimate question, of urse, is whether the effect of one's ing stopped for such questioning validates a later search. *United ates v. Mendenhall* [596 F.2d 706 th Cir. 1979)] is probably the lead- g case from the Sixth Circuit. It ent to the Supreme Court, and ey reversed our finding of a urth Amendment violation.

These are interesting cases be- use they involve rather unusual lice work. Some drug enforce- nt agency people have developed uncanny ability to spot drug cou- rs, and one agent, who operated some time in the Detroit airport, s particularly adept at this. I don't nk any court has approved the g courier profile in toto. Maybe ne court has, but we have not.

The Federal Rules of Appellate ocedure were adopted in 1968. e types of cases and the proce- res used to process cases in the deral courts have changed with e times, but the rules have not en significantly changed. As airman of the Advisory Commit- on Appellate Rules, do you give ought to making those changes or changing how the rules are fted?

We do give a lot of thought to anges. The Advisory Committee s a twofold purpose. First is to nitor on a continuing basis the eration of the Federal Rules of Ap- late Procedure; second is to rec- mend changes to ensure the con- ued effective operation of the es. So we monitor and we recom- nd changes. We receive sugges- ns from all sorts of sources about anges; from practicing lawyers, even litigants sometimes, judges who spot problems with the rules, law professors, obviously—from all these sources. Our practice is to consider every suggestion that we receive.

The first thing we do is pass the suggestions to the reporter for the committee. If she determines that a suggestion is identical or nearly identical to one that the committee has already investigated and discharged, we don't forward it to the full committee. Otherwise, after she makes her investigation and a report on how she thinks it would affect the operation of the courts of appeals, every suggestion is forwarded to the full committee for consideration.

The committee has just completed a study of rule 30, Federal Rules of Appellate Procedure, which requires an appendix in most civil cases. There was some thought that the appendix requirement might be adding unnecessarily to the cost of appeals. The committee conducted an in-depth survey. We contacted many judges, lawyers, law professors, and clerks of court to determine how the appendix is being used—whether it is wasteful, whether it is something that the judges rely on, and whether it helps move cases along. Some of the courts of appeals do not require an appendix. That is not a violation of the rules because there is an exception in rule 30(f) that permits a court of appeals to dispense with the appendix.

The committee concluded that most courts of appeals still find the appendix useful and valuable; also that lawyers find it a good discipline early in the appellate process to be required to think through what they want to send to the court of appeals in addition to their briefs. So the

See LIVELY, page 8

FJC Systems Director Returns to Research

Gordon Bermant, the director of the FJC Innovations and Systems Development Division since January 1982, has asked to return to the Research Division, where he served for six years before moving to the Systems Division. Mr. Bermant came to the FJC as a research psychologist in the Research Division in July 1976 and was deputy director of that division from January 1980 until January 1982, when he became director of the Systems Division.

In his letter to Director A. Leo Levin requesting reassignment, Mr. Bermant wrote: "I have always considered research to be my primary calling, and I would be pleased to return my energies to the very important work of the Research Division. What we began in systems in 1982 set the stage for a transformation of automated systems for the courts [and] we have accomplished much. We have initiated the evolution from centralized to decentralized computing; installed a nationwide standard operating system; built a powerful, flexible case management system that can provide full case management services through the operation of an electronic docket; begun pilot tests of this system in eight appellate, district and bankruptcy courts; and developed training curricula and materials to support the continued successful operation of this system. Along the way we also built a prototype case-management system for the probation offices and conducted a major study of alternative court reporting methods."

In response, Director Levin said Mr. Bermant "has been innovative and creative, inspired dedication on the part of his staff, and achieved an impressive record of accomplishment despite great fiscal constraints. We count ourselves fortunate that he will remain with the Center."

The vacancy caused by Mr. Bermant's return to the Research Division has been announced. ■

LIVELY, from page 7
committee came to the conclusion that the appendix is still valuable, and we recommended that it be kept. We also recommended sanctions for overinclusion of materials in the appendix or for otherwise not following the rules. That was an interesting study, and it's the sort of thing that an advisory committee should do as part of its monitoring service to the courts.

What was the reaction to your recommended sanctions?

Sanctions are now very popular with courts. Our committee found they are not very popular with the bar when we put our proposed amendments out for comment. Most of the comment was on this one small provision recommending sanctions.

I want to emphasize that the Advisory Committee is just that, advisory. Our Standing Committee on Rules of Practice and Procedure actually makes the final decision on what amendments to the various rules—civil, criminal, bankruptcy, admiralty, and appellate—will be recommended to the Judicial Conference and to the Supreme Court. Our job is to keep in touch with the bench and bar to find out where improvements can be made. There will always be a lot of room for improvement, I am sure.

Following the September 1985 meeting of the Judicial Conference, state judges were appointed to the advisory committees on rules. Chief Justice Vincent McKusick of the Supreme Court of Maine is on your committee. Is this mutually helpful?

It is very helpful to our committee. Chief Justice McKusick was appointed in 1984. We were the first advisory committee to have a state judge added. Our response was so enthusiastic, I think it had something to do with the movement to put them on all of the advisory committees. It is a great help to get the point of view of an experienced state appellate judge. Many states modeled their rules after the federal rules. Yet, they "plow a little different ground," so they have some different experiences with the rules, and they can contribute greatly. Chief Justice McKusick was a fine addition to our committee.

What's the answer to the criticism that local rules go beyond the national rules?

It's a valid criticism. Obviously, such far-reaching local rules are not within the spirit of the national rules. Uniformity was one of the chief aims of the movement toward national rules of practice. There is some justification for local variations, because each circuit has a history that antedates 1968 by a good many years; practices had built up, and it would be very difficult to tell the bar that these practices were going to be abandoned. So local rules that do not seriously violate the rules of appellate procedure, but more or less supplement them, do not create problems. However, Judge Edward Gignoux reported to the Judicial Conference in March that the Standing Committee on Rules of Practice and Procedure is beginning a study of all local rules. This is a tremendous task, but it should lead to a reduction in conflicts between national and local rules.

The first woman to be appointed to a federal court was Florence Allen, who took her oath on Apr. 9, 1934. Did the judges on the Sixth Circuit—all men—resent a woman coming into what had been strictly a "man's world"? Are there any around the circuit now who remember her?

I'm the only one. I clerked for Judge Shackelford Miller, Jr., of the Sixth Circuit of 1948. I was in the courthouse a lot that year, and I knew Judge Allen. She was a formidable lady. But she was the only judge who always remembered the law clerks' names. Of course then there were only six law clerks; but she made the effort.

The gentlemen with whom she served were from a different age. They probably had never known a woman lawyer, much less a woman judge. She was not mistreated, but some of these men were uneasy with her. They had never experienced collegial relations with a woman. Although these men, who went to law school in the teens and the twenties, weren't prepared for a female colleague, she was highly respected. And as if to prove that she

See LIVELY, page 9

Robbins Named Acting Head of Education Div.

Professor Ira Robbins, currently serving as a 1985–86 judicial fellow in the Center's Research Division, has assumed the position of acting director of the Continuing Education and Training Division. Professor Robbins is a professor of law at American University's Washington College of Law.

Professor Robbins is already well known to the federal judiciary. He has lectured widely for the Center and has spoken at meetings of both state and federal judges on several subjects of concern to the courts, including habeas corpus and capital cases. He is a graduate of the University of Pennsylvania and Harvard University Law School and was a pro se law clerk in the Second Circuit for two years.

Kenneth C. Crawford, who retired as the director of the Continuing Education and Training Division on May 2, has continued to make his services available to the Center on a contract basis.

The search for a new director of the Continuing Education and Training Division is continuing. Interested applicants for the position should send resumes and supporting papers to the personnel director, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. ■

VELY, from page 8

s an equal, at least, of the men, e became the patent expert on the th Circuit. She wrote some of the st difficult patent decisions that ne out of those years. Judge en, I am sure, felt somewhat left t of things at times, but the re- ct was complete.

f you could make some major nge in the federal court system at would it be?

have mentioned the Article I rt for Social Security appeals. re are several changes that many ges agree on. One is the elimina- or sharp restriction of diversity sdiction. Beyond that, I would to see more experimentation in federal court system. I think we d to stay wedded to our systems our methods pretty much, reas we might be more venture- e. I favor the Intercircuit Panel S. 704, which has a sunset pro- on after five years. If it is not king the way it's intended to, experiment dies. I think that ap- ch is very useful when an idea roached for improving the court em.

ne practice of the courts of ap- s that I would like to see nged is permitting petitions for aring en banc to be filed without cost to the litigants. It is very clear from the rule that deals with petitions for rehearing en banc that they should be the exception and not the rule. However, they are now filed in almost every case. All 15 judges must read all the petitions, and very few are granted. One suggestion that I have heard is to require an additional fee to file a petition for rehearing en banc; it could be a fee comparable to the filing fee in district court. The chance of getting rehearing en banc is remote, and it should be remote. These cases have been heard by panels of three judges, and it is unrealistic for lawyers to expect rehearing after a panel of three judges has reviewed the case. I would like to see some restrictions.

"I favor the Intercircuit Panel Act, S. 704, which has a sunset provision after five years."

One of my serious concerns now, and probably the most serious concern of all appellate judges, is the fact that sentence review is in the offing. This could greatly enlarge the number of appeals. There are some criminal cases now that aren't appealed. I doubt that there would be any that would not be appealed if we had sentence review. This represents a really worrisome development for the courts of appeals because we are already fully occupied and the idea of having to review sentencing is something that we don't relish. ■

SLATION, from page 1

). It has been the Judicial Con- nce's position that placing estate inistration under the Depart- t of Justice creates a conflict of est and generates costly dupli- ns of effort. The Conference be- s that the "administrative" func- s associated with bankruptcy tes pending before the courts uld remain the judiciary's onsibility.

nally, the Senate also amended udgeship bill to include special provisions for bankruptcy cases involving family farmers. The amendment incorporates the provisions of S. 2249. Upon completing consideration of the bill and amendments, the Senate took up H.R. 2211, a House-passed bill dealing with farm bankruptcies, amended that bill to incorporate the provisions of the Senate bill as amended, and passed the amended version of H.R. 2211.

• **Retirement.** Draft legislation has been submitted to Congress to pro-

See LEGISLATION, page 10

Recusal Not Needed If Conflict Is Clerk's

If a judge's law clerk has a possible conflict of interest, the clerk, not the judge, must be disqualified, the Eleventh Circuit Court of Appeals has held. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011 (11th Cir. 1986).

Hunt, acting as receiver of a life insurance company, brought suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), securities law, and state common law against defendants for allegedly engaging in fraudulent transactions that depleted the company's assets. Hunt argued that the district judge should have recused himself because two of the judge's law clerks accepted offers of employment from a law firm representing several of the defendants while the case was pending.

The Court of Appeals disagreed: "Absent actual bias, disqualification is necessary only if a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality [citations omitted]. It is true that a reasonable person might wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Clerks should not work on such cases, just as a judge should not hear cases in which his business associates are involved .... A judge is not necessarily forbidden, however, to do all that is prohibited to each of his clerks. If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified."

In this case, the record indicated that neither of the two clerks in question worked on the case or even talked about it with the judge to any significant extent, and the appellant did not allege any actual bias on the part of the district judge. Thus, the district judge properly denied the motion for recusal, the Eleventh Circuit held in a per curiam opinion. ■

LEGISLATION, from page 9

vide a new retirement system for fixed-term judicial officers, a system similar to that now available to territorial judges under 28 U.S.C. § 373. The legislation would extend the coverage of the judicial retirement system to bankruptcy judges, judges of the United States Claims Court, and United States magistrates.

The purpose of the legislation is to provide a viable system for developing a corps of "senior" federal judicial officers available to assist in the disposition of cases before the courts. Limited authority now exists to recall retired bankruptcy judges and Claims Court judges. The magistrates system has no parallel to even that limited authority.

In his capacity as secretary to the Judicial Conference of the United States, L. Ralph Mecham, director of the AO, transmitted the Conference's recommendation of the proposed legislation in letters earlier this year to House Speaker Thomas P. O'Neill, Jr., and Senate President George Bush. Those letters noted: "The current Civil Service Retirement System is designed for the typical career Government employee who enters the civil service early and remains for many years. Recruitment for judicial office of individuals who are at the peak of legal experience and earnings is made more difficult under that retirement system because their age often precludes the attainment of sufficient years of service to earn significant retirement benefits under the Civil Service Retirement program."

● **Annuities.** H.R. 3570, one provision of which would reform and improve the federal justices and judges survivors' annuities program (see *The Third Branch*, vol. 18, no. 2, at 3), was passed, with amendments, by the Senate. The House version would increase the amount of the judges' annual contribution rate to the annuities system from 4.5 percent to 5 percent, with the government providing any difference necessary to fund the program. The Senate amendments do not change the House-passed increase in the judges' contribution but limit the government's rate of contribution to 9 percent. The Senate version sets an annuity ceiling of 50 percent of the judge's salary (compared to 55 percent under the House version). (The present maximum is 40 percent.) The minimum amount of annuity—30 percent in the House version—is 25 percent as passed by the Senate. The bill also makes significant improvements in annuities for surviving children. ■

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hief Justice Burger Announces Retirement to Devote Full Time to centennial Comm'n; Justice Rehnquist to Be New Chief Justice

Photo courtesy Sup. Ct. Hist. Soc'y

Chief Justice-designate Rehnquist

hief Justice Warren E. Burger mitted to President Reagan on e 17 a letter announcing his re- nent "to be effective July 10 or as n thereafter as my successor is ified."

he Chief Justice announced that of the compelling reasons was ssure that the work of the Com- tee on the Bicentennial of the stitution, of which he is chair- , goes forward so that "the story ur great constitutional system l] be recalled to the American ple . . . to tell that story as it uld be told." The conclusion of letter stated the Chief Justice's ntion "to continue to devote y energy to help make our sys- of justice work better."

esident Reagan on June 20 nom- ed Associate Justice William H. nquist to be the next Chief Jus- of the United States.

e Chief Justice's announcement e as *The Third Branch* was at the ters. Some comments on his ributions to the judiciary follow.

Tributes to Chief Justice Warren E. Burger

William H. Rehnquist, Associate Justice, Supreme Court of the United States, Chief Justice of the United States-designate

I can say without any doubt in my mind at all that Chief Justice Burger will be remembered not just for his leadership of the Supreme Court of the United States but as one of the great judicial administrators that has ever held that office. Certainly he ranks with Chief Justice Taft in that respect.

A. Leo Levin (Director, Federal Judicial Center)

Chief Justice Burger's impact on the procedures and processes of our courts is of historic dimension. He has long recognized the need to seek alternatives to tradition-encrusted ways of doing judicial business. Nor has his interest been limited to courts. But for him, the phrase "alternative dispute resolution" would not have gained the currency it has in our lexicon.

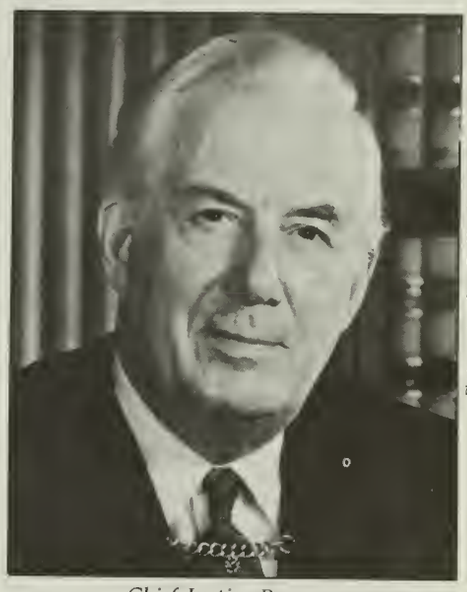

Photo courtesy Sup. Ct. Hist. Soc'y

Chief Justice Burger

His curiosity, and his realization that innovations must be explored even though some will fail, have reaped benefits for the judicial system and, more important, for the lit-

See BURGER, page 2

New D.C. Circuit Chief Judge Wald Interviewed

Judge Patricia M. Wald was born in Connecticut and graduated from Connecticut College and Yale Law School. She is a member of Phi Beta Kappa and Order of the Coif. After clerking for Judge Jerome Frank (2nd Cir.), she became affiliated with a Washington, D.C., law firm.

Judge Wald was an attorney with the Office of Criminal Justice of the Justice Department in 1967–68, then worked for D.C. Legal Services, and later for the Mental Health Law Project for five years, where she was litigation director. From 1977 to 1979, she was assistant attorney general for legislative affairs at the Department of Justice.

Service on various commissions, boards, and councils, including the President's Commission on Crime in the District of Columbia, demonstrates her interest in subjects as diverse as juvenile justice, drug abuse, administrative law, and the judicial process.

Judge Wald was appointed to the District of Columbia Circuit in 1979. On July 26, she will become chief judge of that circuit.

Your new title carries with it a lot of administrative work. Some judges like being a court administrator; others object and say they would prefer to have their time spent strictly on the cases. How do you feel about this?

Seven years on the court have taught me how important adminis-

See WALD, page 6

BURGER, from page 1

igants and citizenry it serves. He believes deeply in the importance of judicial education. Broad acceptance of these values is a legacy of the 17 years he has chaired the Board of the Federal Judicial Center, an organization he helped create through conversations with his good friend Warren Olney. He brought wisdom, energy, and great dedication to that chairmanship. As a result, much of the best of the Center's work is a reflection of his initiatives, insights, and vision.

L. Ralph Mecham (Director, Administrative Office, FJC Board Member)

I know of no Chief Justice who has achieved more in reshaping federal judicial administration than has Chief Justice Warren Burger. He is a judges' Chief Justice, concerned about their welfare and morale. He is also jealous of the lofty reputation of the judiciary for integrity, probity, and the careful husbanding of taxpayers' resources.

William E. Foley (Former Administrative Office Director)

I was fortunate to be both deputy director and director of the AO during the time Chief Justice Burger was in office, especially because of his deep interest in court administration, not only the federal courts but also the state courts. Certainly he ranks with Chief Justices Taft and Hughes, who also worked so effectively in this area. In this respect as well as many other ways, he was an inspiration to all of us. He will be greatly missed.

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Ernest Friesen (Former Administrative Office Director)

Everyone in the field of court administration owes Chief Justice Burger their gratitude for his leadership in establishing its roots and supporting its growth. We would not be where we are today without him. He has done more for judicial administration than any judge in our Nation's history.

Tributes from Chief Judges of the Circuits

Chief Judge Spottswood W. Robinson III (D.C. Cir.)

I was privileged to serve with Chief Justice Burger on the United States Court of Appeals for the D.C. Circuit and to work with him as Chief Justice. Lawyers and legal scholars will long recall his important contributions in many areas of the law in decisions over his 30 years on the federal bench. That body of work speaks for itself. As federal judges we are acutely aware of his unparalleled commitment to improving the efficiency and administration of the federal courts and as a result the quality of justice they dispense. All Americans are indebted to Chief Justice Burger for these contributions to our Nation.

Chief Judge Levin H. Campbell (1st Cir.)

I doubt the lower federal courts have ever had, or will ever have again, as staunch a friend and leader when it comes to promoting their efficient management and operations. The Chief knew that it takes more than words on paper to make a court function. Courts are people—judges, clerks, and administrators. They have all the management problems of any human institution. Chief Justice Burger worked tirelessly to see that the federal courts meet the highest possible administrative standards.

Chief Judge Wilfred Feinberg (2nd Cir.)

In Warren Burger's 17 years as Chief Justice, he labored untiringly to give the judiciary the means of coping with the problems thrust upon them by the unprecedented number and complexity of the cases coming into the courts. He was truly the Chief Justice of the United States, focusing his concern not just on the federal judiciary but on the state systems as well. For example, the Institute for Court Management, the National Center for State Courts, the use of circuit and district court executives, and the modernization of equipment are all due to his leadership. His efforts to obtain an adequate level of compensation for the federal judiciary were unceasing. His place in history is secure.

Chief Judge Ruggero J. Aldisert (3rd Cir.)

I know Chief Justice Burger well. I worked with him for seven years as a member of the Federal Judicial Center Board and, more recently, as a member of the Judicial Conference of the United States. He has a penchant for detail and was thoroughly prepared for every agenda item. He shall be remembered for a unique administrative style and a profound interest in the entire federal judiciary.

Chief Judge Harrison L. Winter (4th Cir.)

I express my personal regret and that of each member of the court that Chief Justice Burger is relinquishing his office. His service has covered a momentous 17 years. He has established an enduring reputation for superb leadership and has earned the admiration and respect of all members of the judiciary. We wish him well in the years ahead.

Chief Judge Charles Clark (5th Cir.)

The Chief Justice advanced the science, the art, and the style of judging as has no other person in history. He does not leave a legacy of precedent alone. Because his unique zeal and zest for judicial administration produced a myriad of innovations, every member of the third branch can do the work of justice at today's pace.

See BURGER, page 13

veral Circuit Judicial Conferences Held, ide Range of Topics Discussed, Debated

hief Justice Burger and Justices ry Blackmun, Byron R. White, n Paul Stevens, Sandra Day Connor, and Lewis Powell were ng the speakers at circuit confer- es held recently.

hief Justice Burger, circuit justice he D.C. Circuit, spoke at the cir- 's judicial conference, held in liamsburg, Va. Chief Judge ttswood W. Robinson III wel- ed attendees to the conference. panel on affirmative action was lerated by Judge Antonin Scalia. conference also featured work- ps on "Juvenile Justice" (moder- l by District Judge Joyce H. en); "Is Deregulation Dead?" derated by Circuit Judge Lau- e H. Silberman); "Problems of Bench and Bar" (moderated by rict Judge Thomas F. Hogan); "Difficult Choices: Coping With rging Caseload in the Court of eals" (moderated by Judge cia M. Wald, who will become f judge of the circuit this th). Professor Henry P. Mon- n of Columbia University ol of Law spoke on "Taking the ts of Appeals Seriously."

e fourth Federal Circuit judicial erence was held in Washington, Chief Judge Howard T. Markey rted on the state of the court. e Markey moderated a discus- "The First Three Years of the ral Circuit: A Critique," which ured views of members of the who specialize in the areas of nts and trademarks, Claims t practice, Court of Interna- l Trade practice, and Merit Sys- Protection Board practice. es representing the Federal Cir- Daniel M. Friedman and Helen ies), the United States Court of national Trade (Chief Judge rd D. Re), and the U.S. Claims t (Chief Judge Loren A. Smith) mented on the lawyers' views. ciate Attorney General Arnold ns spoke on the crisis in tort li- ability and about the Department of Justice's new guidelines regarding consent decrees and special masters. Separate "breakout sessions" on the various areas of practice in the Federal Circuit dealt with specialized topics in each area.

Chief Judge Charles Clark presided over the forty-third Fifth Circuit judicial conference, held in Houston, Tex. Justice Byron R. White, circuit justice for the Fifth Circuit, and Solicitor General Charles Fried were among this year's speakers. Program segments included Duke University Law School Dean Paul D. Carrington's talk on "The Constitutionalization of Morality"; the introduction of new judges; panels on recent decisions of the Supreme Court, jury selection and comprehension, bankruptcy cases, RICO liability, and complex litigation; and talks on mass torts, federalism, and the subject "Are Lawyers Benefiting Our Society?"

The forty-seventh Sixth Circuit judicial conference was held in Memphis, Tenn. Chief Judge Pierce Lively welcomed the conferees. Justice Sandra Day O'Connor, circuit justice for the Sixth Circuit, addressed the participants. A panel on civil RICO discussed developments since the case of *Sedima v. Imrex Co.*, 105 S. Ct. 3275 (1985). Other panels dealt with recent developments in the awarding of fees in federal courts and in § 1983 litigation.

The Seventh Circuit judicial conference was held in Milwaukee, Wis. Chief Judge Walter J. Cummings gave a report on the state of the judiciary. Justice John Paul Stevens, circuit justice for the Seventh Circuit, gave a report on the work of the Supreme Court, and Attorney General Edwin Meese III and Congressman Robert W. Kastenmeier (D-Wis.) spoke. "Current Advocacy Issues in the Court of Appeals" and "Current Practice Problems in the District Courts" were among the presentations. Both discussions were led by panels of judges and practicing lawyers. The session on current advocacy issues was designed to elicit an exchange of views on the

See CIRCUITS, page 15

Civil Rights Plaintiff Awarded Fees, Costs From State Judge Under *Pulliam* Rationale

In a civil rights case brought by a woman who had been jailed by order of a state judge, the defendant judge has been ordered to pay attorneys' fees and costs pursuant to 42 U.S.C. § 1988. The case, *Davis v. City of Charleston*, No. S 84-283C[D], slip op. (E.D. Mo. May 6, 1986), was decided by U.S. District Judge H. Kenneth Wangelin and depended for its holding on the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984). *Pulliam* held that Congress did not intend to limit the injunctive relief available under 42 U.S.C § 1983 so as to prevent such relief against a state judge and that a prevailing plaintiff in such a case is also entitled to recover attorneys' fees from a defendant judge under § 1988.

The plaintiff in *Davis* had been sentenced to 14 days in jail by a Missouri circuit judge after she failed to pay a $250 fine for disturbing the peace. The judge had issued an order requiring plaintiff to appear and show cause why the fine would not be paid, or to pay the fine by a certain date. The plaintiff informed the court by telephone on the appointed date that she did not have the money to pay the fine, thereby raising "at least an inference" that the reason for nonpayment was one of poverty rather than contempt. Judge Wangelin ruled that the Missouri judge erred when he sent her to jail without first holding an "on-the-record" hearing to determine conclusively the reason

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Public Hearing Held on Prior Records; Questions About Guidelines Answered

This is one in a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

The commission's second public hearing, on May 22, dealt with how the sentencing guidelines should treat a defendant's prior criminal record: How, for example, should the commission define state felony and misdemeanor offenses in view of the definitional disparity among states and between states and the federal system? How, if at all, should the guidelines take into account the length of time that defendants with prior records have gone without committing new crimes? Should juvenile offenses be considered in establishing sentences for adult offenders?

NEWS FROM THE SENTENCING COMMISSION

The hearing continued the dialogue between the commission, members of the criminal justice community, and other interested groups and individuals. Among the witnesses were William F. Weld, U.S. attorney from Boston; Thomas W. Hillier, federal public defender from Seattle; Donald L. Chamlee, director of the AO's Probation Division, and three probation officers from across the country; and Melvin D. Mercer, section chief in the FBI's Identification Bureau.

Hearings on sanctions imposed on organizations were held June 10. Hearings are scheduled on sentencing options (July 15) and plea negotiations (Sept. 23).

Questions and answers. Whenever the commission meets with judges, lawyers, probation officers, and others in criminal justice, many of the same questions are asked. The "News from the Sentencing Commission" column will present some of these questions and answers, which, said Judge William W. Wilkins, the commission's chairman, "reflect the opinion of the U.S. Sentencing Commission and are phrased in terms of what will happen when the guidelines go into effect."

When do the guidelines become effective?

The commission must submit sentencing guidelines to Congress by April 13, 1987. Congress has six months from the date of submission for examination and review. By statute, the guidelines are to go into effect at the end of this six-month period. Congress may, of course, change these dates.

Because parole is abolished for defendants sentenced under the guidelines, what will happen to defendants sentenced prior to the effective date of the guidelines?

Inmates serving existing sentences will not be affected when the sentencing guidelines go into effect. The guidelines and policies promulgated by the commission will only apply to those defendants who commit offenses and are sentenced after the effective date of the guidelines. The release date for prisoners who were not sentenced under the guidelines will be set by the Parole Commission before it is statutorily abolished five years after the guidelines go into effect (see 18 U.S.C. § 3551).

Will the guidelines allow for consideration of special concerns or problems in a local community regarding a particular crime?

Yes. Congress has authorized the commission to take into consideration relevant public concern generated by an offense, the community view of the gravity of an offense and the current incidence of an offense in the community and nationally (see 28 U.S.C. § 994(c)).

See SENTENCING, page 1

Massachusetts Calendar Notes Bicentennial Events

The calendar of the United States District Court for the District of Massachusetts contains a lesson in constitutional history every day.

That's because since March, the calendar of court business posted each day throughout the courthouse and distributed to all court-related offices also includes a brief note describing a significant event in constitutional history that occurred in a previous year on that date. These "United States Constitution Bicentennial Notes" appear as the lead item on the daily calendar, neatly boxed and in boldface type.

"It's an eyecatcher," explained Clerk of Court George F. McGrath, whose office prepares the calendar. "It's a constant reminder of the Constitution's history, every single day."

McGrath explained that the idea was proposed by Judge A. David Mazzone, upon receipt of a bicentennial calendar issued by the Commission on the Bicentennial of the United States Constitution. Chief Judge Andrew A. Caffrey readily endorsed the concept, McGrath said, and starting on March 20 and every court day since, the clerk's office has headlined its daily calendar with the historical notes from the commission's bicentennial calendar.

The bicentennial notes have quickly become a popular item around the courthouse, McGrath said. For example, on May 14, the calendar noted that on that date in 1787, the opening of the Constitutional Convention was delayed because representatives of only two states were present. McGrath said that his office received numerous calls from readers that day inquiring, "which two states?"

Sample copies of the District of Massachusetts daily calendar incorporating the bicentennial notes are on file at the Center, and may be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a stamped, self-addressed envelope (1 oz.).

Chief Justice Burger Shares Concerns for Administration of Justice with ALI Meeting

The legal profession is changing, nd some of these changes reflect egatively on the profession, Chief stice Burger told the annual meet- g of the American Law Institute.

In his speech, the Chief Justice ed "very disturbing developments the administration of justice hich must be studied," including:

- Excessive and unrealistic jury vards, especially on punitive dam- es;
- High increases in insurance sts, especially for product liability, ofessional practice liability, and ner comparable areas;
- Unnecessarily long trials, many nes prolonged when judges allow e lawyers to control the jury selec- n process; the jury selection is the dges' responsibility, after receiving m counsel, if necessary, proposed estions to prospective jurors;
- Contingency fees. The whole area should be studied, said the ief Justice, and where necessary rrected. "The true function of our ofession should be to gain an ac- otable result in the shortest possi- time with the least amount of ess and the lowest possible cost to client. If courts do not take con- of this subject, legislatures will."

Published conclusions that a "liti- ion explosion" does not exist are nsense; the Chief Justice is ada- nt that increasingly heavy case- ds are prevalent in both state and eral courts, especially the latter.

n speaking to the same group last r about the administration of civil tice in the United States, the ef Justice asked, "Is there a better y?" The ALI studied the issues ed by his question, and ALI Di- cor Geoffrey Hazard, ALI Presi- t Roswell Perkins, and Judge n M. Adams of the Third Circuit planning a conference to explore issues. Judge Adams is chairman he ALI's organizing committee. date has been set.

A related development is a study of the legal profession commenced last year by the ABA's Commission on Professionalism under the chairmanship of Justin A. Stanley, former ABA president and a prominent Chicago practitioner. The Chief Justice termed the study "very significant." This group will focus principally on recent developments that are making an impact on the practice of law. The commission's report is expected to be presented to the ABA's house of delegates next August.

The Chief Justice also cited a recent lecture by ALI member Daniel Meador, a University of Virginia law professor, who said, "The American legal scene is the most complicated in the world." Professor Meador was referring to the system as a whole, the Chief Justice added, not to the "acute developments of the past five years or more."

With input from the ABA and the ALI as well as practicing lawyers and judges (state and federal), the upcoming ALI study of civil justice should be as significant as the ABA study of criminal justice standards and the 1976 Pound Conference.

Also reflecting concern about the legal system is a 1986 book by the ABA Lawyers Conference Task Force entitled *Defeating Delay—Developing and Implementing a Court Delay Reduction Program*. Chief Justice Burger's foreword to the volume commends the manual as an "example of the profession seeking to improve its work." ■

Judges Broderick, Peckham Testify Before House Subcommittee on Court-Annexed Arbitration Bill

Two federal judges were among those testifying at a recent hearing on arbitration and the federal courts before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives. The hearing concerned the proposed Court-Annexed Arbitration Act of 1986 (H.R. 4341).

Judge Raymond J. Broderick (E.D. Pa.) and Chief Judge Robert Peckham (N.D. Cal.) testified about the use of court-annexed arbitration in their respective districts. Chief Judge Peckham is the chairman of a task force appointed by Chief Judge James R. Browning of the Ninth Circuit to study alternative dispute resolution in that circuit. The statement of Judge Elmo B. Hunter (W.D. Mo.), chairman of the Committee on Court Administration of the Judicial Conference, was also read into the record at the hearing.

Since 1978, the Eastern District of Pennsylvania and the Northern District of California have operated pilot court-annexed arbitration programs. In addition to those districts, eight additional courts instituted arbitration in a variety of forms between October of 1984 and January of 1986. H.R. 4341 would expressly authorize the existing ten programs and provide for such programs in five additional districts if the Judicial Conference approves.

Judges Broderick and Peckham noted that the programs in their respective districts differ substantially from each other. For example, the arbitration proceedings in the Eastern District of Pennsylvania take place in the courthouse, whereas those in the Northern District of California are conducted in a more informal setting; the Pennsylvania arbitration proceedings are conducted by a panel of three experienced lawyers, whereas the California cases are heard by a single arbitrator.

Existing programs have been operating without specific statutory authorization, although funds to operate them have been appropriated by

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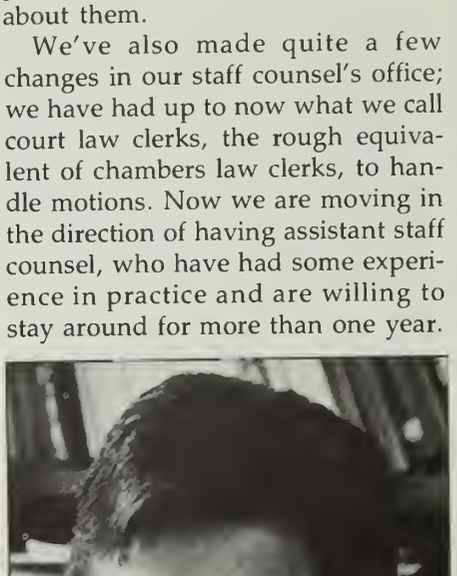
tration is, especially in this court. At the present time we are facing a serious rise in our filings and the beginnings of what could be a serious backlog problem. Therefore, I think that administering the court, making sure that we use our most important resource—which is judge time—wisely and efficiently, is critical. I am quite willing to and I intend to devote as much time as necessary to accomplish that goal.

Everybody on the court probably would rather spend their time deciding substantive cases, but there is no question in my mind that running a court efficiently, keeping the other judges reasonably content with the way in which the court is being run, will over the long run be a valuable investment of my time. I've had some administrative experience in the government, and that has reinforced my sense of how important administration is and that you have to spend time on it.

Are you introducing any new procedures, especially those that relate to processing cases?

Actually, this is a very critical summer and upcoming year for us. Because of the upsurge in cases, we have had a judges' task force working all spring on many new reforms in the way we schedule our cases. We are going to put those into operation over the summer. It probably doesn't merit going into all of the details here,except to say that we are drawing quite a bit on the experience of some of our sister circuits which have tried such things as the expedited or fast calendar, in which most of the cases do not need oral argument and dispositions can be done more quickly. A particular need in this circuit is for a special calendar for the complex administrative law cases, which take so much of our time. We are going to make sure that the same panel has those cases from the very beginning, so that they don't get fragmented between motions panels and merits panels and so that panel can itself move the complex cases along at an appropriate rate and make all of the preliminary preargument decisions about them.

We've also made quite a few changes in our staff counsel's office; we have had up to now what we call court law clerks, the rough equivalent of chambers law clerks, to handle motions. Now we are moving in the direction of having assistant staff counsel, who have had some experience in practice and are willing to stay around for more than one year.



Judge Patricia M. Wald

This is the pattern in most other circuits. All of these changes are geared to enabling us to process as many more cases as we need to and as quickly as we want to, with the right amount of judge time that the cases deserve. I do emphasize, though, that we are not just in an automatic case-processing business to bring our numbers up. We still plan to give each case its due. But I think all of us have felt that there are quicker ways to do justice in some cases, and in fact our changes will allow us more time to spend on the cases which require more time.

Do you have any screening procedures established for the circuit?

Well, let me talk about CAMP a little bit and then about what we are looking to accomplish through computerization. We have had for many years, at least as long as I'
been here, a form of CAMP— t
civil appeals management plan. T
staff counsel would pick out tho
cases that looked like they were g
ing to be very complex and comp
cated with many parties involv
and then get all the counsel togeth
to see if the issues could
simplified, and whether some of t
briefs could be consolidated. In a
dition, she would propose a form
for the oral arguments. The fact
mains, however, that she is only o
person with one assistant. In th
sense we have had a much smal
staff counsel's office, certainly, th
the Second Circuit and many of t
other circuits. What we plan to do
the future is to energize our st
counsel's operations and realloca
her time. We feel that with more
perienced assistant staff counsel
work on the motions and some
the other duties, we will be able
free up the staff counsel and her
sistant to do a lot more by way
early identification of the cases t
need to be managed.

We're also going to begin, ve
modestly, some experimentation
the settlement area. We've do
none of that. There has never be
any attempt to settle cases at the a
pellate level here. We are all aw
of the Second Circuit's very envia
record in terms of the number
cases that they have settled; in fa
we have had a member of their st
down here to talk to us. Everybo
thinks, however, that there may b
big difference in the potential
settlement in this circuit as oppos
to the Second Circuit. Well over
percent of our cases are governm
cases. I think the Second Circuit
a lot more commercial cases—p
vate party cases. That doesn't me
that there isn't some potential
settlement in our cases, but we
have to work slowly and find
just what the potential is bef
using any substantial amount of
sources in these Gramm-Rudm
days.

As far as computerization go

we have a new circuit executive who does have background in computerization. Given Gramm-Rudman and given the Administrative Office's own program specs for computerization, again our money will be limited; we are going to do the best we can with our resources.

How are the panels assigned in your court?

The panels are assigned without any participation by any of the judges, including the chief judge. We try hard for complete randomization, so that there will be no inference that particular judges have been assigned to particular cases. The chief judge, as it is now, does not participate in any of the assignment of judges except in three-judge courts, and then he has a seriatim list that he goes by. I think that's the right thing to do. I was a lawyer in this circuit and I know how concerned we were that particular judges would not be automatically assigned to particular types of cases. I think it is very important—especially in a court that is made up of judges with varied backgrounds, ideologies, and leanings—to make sure that nobody thinks that the chief judge or any other judge is able to handpick cases. As far as I'm concerned, the randomization procedure works well.

Your dissents record some strong feelings on certain issues. Do you feel it important that this emphasis be recorded for the benefit of the bar and parties to the litigation?

I couldn't imagine writing a dissent if I didn't feel strongly about it, and I don't think that my dissents are any more strongly worded than most of my brethren's or my sister's on the court. I think dissents are important, though one shouldn't be profligate about writing them at the drop of a hat. In a period when the court does have quite strong differences on very important points, I believe that a heartfelt dissent serves a positive function, not only in expressing the dissenter's view to the bar, to one's colleagues, possibly to the Supreme Court, and to commentators in the field. But even more important a dissent usually has the effect of making the majority think twice. The majority, in light of the dissent, sometimes moderates its own opinion and sometimes goes to a second deeper level of thinking when it has to answer the issues raised by the dissent. So if one keeps dissents on a civil level, they can serve a constructive purpose. Dissents make sure that all the issues have been gotten out on the table. I know in my own case if I anticipate a dissent, I pay extraordinary care to the rationale of the majority opinion I am writing. Sometimes points that slip by if you don't have any opposition will surface and get resolved if you have somebody watching over your shoulder, ready to point out every possible error.

> **"In a period when the court does have quite strong differences on very important points, I believe that a heartfelt dissent serves a positive function ...."**

Sometimes a dissent ultimately comes out a majority opinion.

I've seen that happen often in panels. I have also seen it happen in en bancs. Then there is also the old technique of writing what's been called the "invitational dissent" to get the attention of the Supreme Court, something which has gone on for decades and decades. The judge that I clerked for, Jerome Frank of the Second Circuit, was a famous dissenter; he was very open about the so-called invitational dissent, often beginning his dissent with a phrase like, "Even if I haven't won my brethren ...."

You have expressed concern about conflicting opinions of federal courts (including the Supreme Court) on the liability of government decision makers, especially over the past 25 years. Has anything made you change your views?

Well, I don't think we have yet settled for all time the state of individual or official liability. As I pointed out in a law review article, it is a very thorny problem. Nobody wants to take away accountability; at the same time, nobody wants to chill government officials' capability to make on-the-spot decisions for fear that they'll have to take out mortgages on their homes in order to pay personal liability awards. When I was in the government I worked hard but unsuccessfully on a bill—and I still think it is an excellent idea—which would extend the Federal Tort Claims Act to waive sovereign immunity for the so-called constitutional torts for which most individual government officials are now sued individually, the § 1983-type actions. That would serve as a middle ground between making sure there were some adequate remedies for victim wrongs, yet not penalizing officials who make mistakes by threatening them with economic ruin. It would also provide the courts with a better atmosphere in which to make liability decisions. We have had very few verdicts against individual government officials where they had to pay out of their own pockets. You can count the number on one hand. The courts really don't like to penalize an individual government employee that way unless they absolutely have to. We could make our decisions about the rights and wrongs of government conduct in a less pressured way if we didn't have to worry about bringing personal economic ruin on people. This is one area where the solution may have to be

> **"... I think after a year on the court you probably know the Administrative Procedure Act by heart."**

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legislative. I also point out that part of the bill that I worked on did have an alternate mechanism for disciplining administrators who were found to have violated somebody's constitutional rights, so they were not going to get off scot free. Right now the debate is being played out under the rubric of the ancient doctrine of immunity, and I think that is probably too heavy a burden for that doctrine to bear. That is why I'd like to see the Federal Tort Claims Act amended.

As chief judge, you will have to handle initially any complaints filed against judges on the Court of Appeals for the D.C. Circuit.

Well, I've been on the court before and since passage of the Judicial Conduct and Disability Act of 1980, the act that sets up procedures for processing complaints against judges. I am aware that the chief judge is the gatekeeper. Some of these complaints have gone on to committees for consideration by the judicial council. I think it's probably one of the least pleasant aspects of the job, but a necessary one. The present chief judge, Spottswood Robinson, has performed admirably, and I can only hope to follow in his footsteps.

You recently wrote an article in which you pointed out that different judges play different roles: "loner, inveterate disagreer, almost automatic agreer, or a conciliator able to influence rationales or even results by negotiations." What is your role?

It has varied from case to case and from time to time. There are eras on the court when you are in sync with the majority of the court, and then personnel changes come about among the judges and you may find yourself more frequently in the minority. I suppose that any judge who spends any considerable amount of time on a court runs into that. One aims in a period of sharp ideological differences among the judges to try to find the common ground in as many cases as possible. I think at this particular time the role of conciliator—if you can conciliate your own conscience—is an extra important one. On the other hand, no one looking at my record would say that I am an inveterate agreer, and I hope that they don't think I am an inveterate disagreer. A quick look at the statistics, I think, would indicate that I don't dissent that much more frequently than most of my colleagues. On the other hand, there are some of my colleagues who hardly dissent at all, and I'm certainly not in that group. As law gets more and more prolific, and there are more and more decisions out there, and the difficulty of making decisions consistent becomes greater, we all strive to find something that will hold the court together. On a practical level we simply can't afford to have more than a certain number of en bancs a year. We simply cannot accommodate them in our schedule, and so in important cases it is generally more profitable to try to find a common ground on the panel level rather than have to go on to the en banc level.

The Federal Judicial Workload Statistics for the year ending Sept. 30, 1985, show that the D.C. Circuit had almost a 41 percent increase in filings, the highest increase in the country. To what do you attribute the sudden increase, which brought an attendant decrease in terminations?

Well, we've asked ourselves that question again and again, and interestingly enough during the year in which we had the greatest upsurge it was across the board, not concentrated in any one area. Now, agency cases, as you know, account for the largest proportion of our cases, and we did have a disproportionate increase in them. But we also had an increase in U.S. civil, private civil, and even some in criminal. Now this year, so far, our statistics show a slight decline, something around 11 percent. On the other hand, the prior year left us with a great amount of cases to be disposed of. We also have had some increase in our terminations. That's encouraging, especially since we now have

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Chief Deputy Clerk, U.S. Court of Appeals for the Eleventh Circuit. Salary to $52,262, depending upon experience and education. Minimum requirements six years' progressively responsible managerial or administrative experience; bachelor's, postgraduate, or law degrees desirable. Send resume with cover letter highlighting relevant experience by Aug. 11 to Miguel J. Cortez, Clerk, 50 Spring Street, S.W., Atlanta, GA 30303-3147.

EQUAL OPPORTUNITY EMPLOYERS

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two vacancies on the bench, so if we have two more bodies by this time next year, we ought to be able to do considerably better on that. In the first couple of years of this administration our agency cases dropped precipitously—regulations were not coming out as fast, some agency spots had not been filled, so that the backlog was forming at the agency level rather than ours. Once those got filled and the agencies processed their own cases, they started pouring in to us. Still, overall over a 10-year period, or a 5-year period, even though we have these roller coaster things from year to year, there's no question that the filings have gone up. I think that's the thing we are trying to deal with now, the fact that the caseload is not going to go down much from what it is now. I doubt that we will have an increase in judicial resources, so that's why we're trying to use our judge time in the best way possible.

Statistics for the same time period show that your court received new filings totaling 1,428 cases, 50 percent of which involved administrative law cases. Are there special problems involved with administrative law cases, or does this high percentage mean the members of your court develop an expertise which makes it easier?

Let me go back to the first part of your question. Administrative law cases are the bread and butter of this circuit, and nobody comes on to this circuit without knowing that's what they are going to get. Administrative law cases are not, however, fungible. We have some that are relatively simple, and they can be turned out relatively fast (although they tend to be more complicated than private civil actions). We have some agency cases that are incredibly complicated, that have 200 different parties appealing from a major regulation and thousands of pages of appendices. Actually, I found that the issues, the legal issues, in administrative law are not more complicated, they are in fact less complicated than in some other fields of law. What is complicated is wading through the evidence that goes to support the regulations or the procedures that went on down below at the agency level, or understanding the basic transaction or the subject matter that the agency is dealing with in order to be able to evaluate whether what the agency has done is rational and not arbitrary and capricious. Those are the things that take most of the time. As far as experience in administrative law is concerned, I think after a year on the court you probably know the Administrative Procedure Act by heart. You probably know all the major precedents in the administrative law field. In that sense, you know the analytical framework, but I don't think any number of years on the court will prepare you for the wide variety of scientific and other subject matters which you have to evaluate in terms of those issues. I mean, one day you may get a complicated gas and oil case, the next day a Medicare regulation, the next day a labor problem; so that there is always something new around the corner. I don't think one ever can say, "Oh, well, this is just another administrative law case." Actually most people outside would say, "Oh, isn't that too bad you have to spend all this time with this boring administrative law case." They are not boring. I have come to like the administrative law cases better than many of the more traditionally attractive constitutional law cases. The administrative law cases affect a lot of people. They are part of the life around us. They usually involve some very interesting areas that you can learn about that you wouldn't learn about otherwise. So I'm quite content with that being a major part of our workload.

"[W]e may have to be less tolerant of the delay-oriented, frivolous cases."

It's funny: The law clerks who come to the court are thrilled in the beginning with the notion that they'll get to work on a constitutional law case, and they are appalled at the notion they may have to work on Federal Energy Regulatory Commission cases that year. By the end of the year, many of them say they really enjoyed the administrative law cases and they were tormented, as indeed they should be, by the constitutional law cases.

Would you favor the establishment of a special court to handle only Social Security cases?

I am probably not the best person to ask about that. We simply don't get that many of them in this circuit. The occasional ones we get don't give us the feeling of being overwhelmed. I will generalize, though, about the administrative law cases of which we do get many more than other circuits. There are many statutes which have only the D.C. Circuit as the forum of review. I have heard and read about proposals to establish administrative law courts, environmental courts, and other special courts. Generally, I have not been in favor of those. I have thought that with respect to the important administrative law appeals that we get—in the environmental field, even from the Federal Energy Regulatory Commission— that it was a very healthy thing to have them reviewed by a generalist court. Having to make your case to nonspecialists means that the agencies have to write their rationales and make their decisions with the expectation that they can be explained adequately to and convince a court of intelligent generalists. That requires the agencies to think about their rationales more carefully and not use too much jargon. I have generally been wary of proliferation of specialized courts.

I am afraid of the balkanization of administrative law with specialized courts. I think there should continue to be some unifying principles of

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administrative law.

It has been said that the volume of motions practice in the courts of appeals has gone up, that it is even a potential problem. Is this true?

Our motions practice did go up simultaneously with the upsurge of filings. As best we can analyze it, a couple of things happened. One, we have had a dichotomy between the way motions are processed and the way merits cases are processed. Judges sat on motions for two months, and with the help of the court law clerks and the staff counsel a motions conference was held every week and 20 to 30 motions were decided. Meanwhile, the merits cases were going along on a different track with different panels. We found that the longer a case of any consequence or of any complexity stayed on our docket, the more motions it tended to generate. In other words, if it was there for a year, it tended to spawn a flurry of motions. Lawyers, I guess, become frustrated with waiting and say, "Let's file a motion to dismiss; let's file this, or that." So we hope that as we work to process the merits cases more expeditiously, we will see a downgrade in the number of motions that those cases are generating along the route before disposition.

The second thing relates to something I mentioned earlier. By taking our most complex cases and putting them on a special track, the same panel will sit on the case from the beginning to the end, including all of the motions as well as the final merits. That system, I think, will produce two advantages. One, lawyers will be more reluctant to file marginally useful motions when they know that the same panel will look at all of them as well as evaluate the case at the merits level. Secondly, we will have less confusion and inconsistency on the outcomes. I have seen some cases—lamentable, but they have been there—where a motions panel has done one thing that has sent the wrong signal to the litigants, who have then been surprised or dismayed, as the case may be, by what the merits panel did; we have had possible inconsistencies that lead to confusion as to the law of the case, as to what is happening, and as to scheduling because two different panels—or maybe three or four, depending on the number of motions—were sitting on the same case. By keeping one panel with that case all the way through, I think we can eliminate some of that. Also, generally trying to bring the argument on the merits of the case closer to the date of filing of the appeal, we will leave less time in there for these motions.

"My main goal is to be an efficient chief judge . . . ."

Have you used rule 11 to impose sanctions very often in the D.C. Circuit?

In the last year this court, somewhat belatedly, has begun to impose sanctions on frivolous appeals by assessing the attorneys' costs and the costs of the appeals to the other party. In the last six months I think we've had six to eight of them. That may not sound like much, but it is a giant step for us. Our judges feel somewhat overwhelmed by the numbers of cases we are being hit with and are recognizing that if we are to take care of the important cases we may have to be less tolerant of the delay-oriented, frivolous cases. Some of our opinions discussing the bad effects of frivolous pleadings and assessing costs have been very strongly worded, so that if those counsel intend to practice extensively in our court in the future, they had best think long and hard before filing their next dubious brief or motion.

Because of Gramm-Rudman cuts, most of the circuits are making many changes. What has the D.C. Circuit done?

Gramm-Rudman has hit us hard, along with most of the other circuits. We have submitted our proposals for taking the cuts to the Judicial Conference committee. I think the timing of Gramm-Rudman has been particularly unfortunate for us in a couple of ways. One, we are at a juncture right now where we want to do some new things; we need to do some new things like computerization because of our rising backlog. Some other circuits, perhaps more foresightedly than we, asked for extra staff and special programs years ago when funds were more available. Now, just when we really want and need some infusion of new programs, the ceilings have been imposed. Nonetheless, we are determined to move ahead as best we can. I understand the theory of Gramm-Rudman—that everybody takes the same cut—but it is ironic that the judiciary will have to absorb cuts out of such a small budget. You can go just so far in terms of no new library books or no more travel allowance or no coffee and doughnuts for the jurors. But you hit that bottom very soon, and then you are into personnel. Most of us do not feel that we are overstaffed by any means, quite to the contrary. The large agencies have much more to cut from before they have to hit at the core of their functions.

To what extent do you involve your law clerks in your work?

Law clerks are extremely valuable because of the sounding board role that they play for judges. In a busy court your colleagues just do not have time to go into the details of opinion writing with you. In other words, we hear the case, we have an initial conference, and we tell our colleagues our reasons, and then we go off and one judge writes the opinion. The other judges are so busy that you don't walk down the hall and start talking with one of your colleagues about how you are going to word this sentence or elaborate a point. They are busy writing their own opinions. Yet, very often when you start to write an opinion you find it is a minefield, and all

See WALD, page 1

WALD, from page 10

sorts of new problems emerge that simply didn't surface at the level of oral argument or in your conference with your colleagues. And it is there that the law clerks, aside from the research and the checking and sometimes the drafting that they do, are so valuable. They have to listen to you. They have to debate with you, and if they are good law clerks they will tell you when they think you are right and when they think you are wrong; you will get the benefit of their reactions to your ideas. Now it is possible to become overly dependent on them; all of us are cognizant of that, although the fact that we only have them for one year at a time helps to counter the dependency danger. I think it was Wade McCree that said judges should always remember, in relation to their law clerks, the old biblical statement that "Methuselah leaned on his staff and died." When all is said and done, however, there is no judge in the world that can actually read every page of every record, check every footnote, all by himself or herself without help. We simply have to be selective in what requires our personal involvement and what we are able to delegate.

Do you select from certain schools?

No, I don't. Over the last seven years I must have selected from a dozen schools. There is no question that sometimes when you have had very good experience with one school, you tend to give weight to the recommendations of particular professors who have sent you very good people, but I always try to spread it around. In any one year I wouldn't want to have more than one or at the most two from the same law school because there is a risk of getting a repeat of the same response. Different orientations and insights on the same subject matter often come from law students who have gone to different schools and have been exposed to different professors and philosophies.

I have had clerks from Yale, Harvard, Columbia, New York University, Northwestern, Wisconsin, George Washington, Georgetown, Stanford, and Michigan.

Only one woman has previously served as a chief judge of a federal circuit court, and then for only a little over four months, so you are making federal court history. Would you like to comment? [Judge Florence E. Allen (1884–1966) served on the Sixth Circuit from April 1934 to October 1959. She was chief judge of the circuit from Sept. 17, 1958, until Feb. 5, 1959. Subsequent amendments to title 28, United States Code, require that a chief judge relinquish a chief judgeship upon attaining the age of 70.]

Only recently I learned I will not be the first woman chief judge of a circuit; Florence Allen in the Sixth Circuit held that honor back in 1959. I read a book about Judge Allen that was quite interesting. Her period as chief judge came at the tail end of 25 years of serving on the Sixth Circuit,

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PERSONNEL

Nominations

John E. Conway, U.S. District Judge, D.N.M., May 14
Edwin M. Kosik, U.S. District Judge, M.D. Pa., May 14
William D. Stiehl, U.S. District Judge, S.D. Ill., May 14
D. Lowell Jensen, U.S. District Judge, N.D. Cal., June 2
William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., June 3
Karen L. Henderson, U.S. District Judge, D.S.C., June 3
Charles R. Simpson III, U.S. District Judge, W.D. Ky., June 6
William H. Rehnquist, Chief Justice of the United States, June 20
Antonin Scalia, Associate Justice, Supreme Court of the U.S., June 24

Confirmations

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, May 14
Alan E. Norris, U.S. Circuit Judge, 6th Cir., June 6
John G. Davies, U.S. District Judge, C.D. Cal., June 6
Patricia C. Fawsett, U.S. District Judge, M.D. Fla., June 6
David Hittner, U.S. District Judge, S.D. Texas, June 6
Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., June 6
Nicholas Tsoucalas, Judge, Court of International Trade, June 6
William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., June 13
Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., June 13
John E. Conway, U.S. District Judge, D.N.M., June 13
Karen L. Henderson, U.S. District Judge, D.S.C., June 13
Edwin M. Kosik, U.S. District Judge, M.D. Pa., June 13
William D. Stiehl, U.S. District Judge, S.D. Ill., June 13
Douglas P. Woodlock, U.S. District Judge, D. Mass., June 13

Appointments

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Mar. 27
J. Daniel Mahoney, U.S. Circuit Judge, 2nd Cir., Apr. 29
Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., May 2

Senior Status

J. Skelly Wright, U.S. Circuit Judge, D.C. Cir., June 1
Robert Boochever, U.S. Circuit Judge, 9th Cir., June 10
Leroy J. Contie, Jr., U.S. Circuit Judge, 6th Cir., June 30
Leonard I. Garth, U.S. Circuit Judge, 3rd Cir., June 30
Frank A. Kaufman, U.S. District Judge, D. Md., June 16

Retirement

Warren E. Burger, Chief Justice of the United States, July 10, or as soon thereafter as a successor is qualified.

WALD, from page 11

from 1934 to 1959, and it was more a capping of her career than I perceive my job will be. Right now in this court we are undergoing a transition from one generation of judges to another. In seven years I have assumed the senior position on a court of twelve judges. That kind of personnel turnover brought about a lot of changes in the way the court operates. Also, because of the caseflow problems we have talked about, we'll be doing things a lot differently, trying out a lot of new systems. We also have a new staff counsel and a new circuit executive, so in a sense the court really is entering a new era.

Back to Judge Allen for a minute: She had been a hard fighter for the causes she believed in. At one point she made a statement that she didn't think that you could have the kind of active career that she had had in the law and be married and have children; I think that was the feeling of those times—that you had to make a choice. Obviously, my situation with five children is very different, and I think that speaks well for the progress that women have made in at least getting rid of the stereotype that you have to choose forever between career and marriage or motherhood. Although I don't suggest that there are not periods in a woman's life when you do have to make choices, or that those choices are easy, I don't think you have to make a permanent choice one way or the other anymore.

The other thing that was interesting in Florence Allen's biography was her very discrete anecdotes about the reaction to her coming on the court. She said that she heard that one of the judges upon learning of her appointment took to bed for two days. Other judges wouldn't meet her glance head on. They went out to lunch very frequently to a men-only club without taking her. She wasn't assigned certain kinds of cases. None of that would happen now. Whatever lingering discrimination there may be in court systems against women, there is no question that on our court none of the things that happened to Florence Allen would happen, nor would we let them happen.

"After a while people should forget that I am a woman, but I should never forget it."

I believe that being a woman chief judge has some significance. It's important in one sense to get it over with, so that if I do well, nobody will raise an eyebrow the next time. My main goal is to be an efficient chief judge, to make life a little easier for the other judges so that they can worry about judging and not about all the things that are going wrong around the courthouse. After a while people should forget that I am a woman, but I should never forget it. There are still areas in which women, because of their past experience, should always try hard to make sure that some of the things that happened to them won't happen to other women.

At the time Judge Allen was chief judge, there was no requirement that the chief judge relinquish the position upon becoming 70 years of age.

Yes. And when she left the chief judgeship she retired; she did not continue to serve. But make no mistake, she was tough. As Chief Judge Lively said in his interview in *The Third Branch* [June 1986], she was a formidable woman. On the other hand, reading her biography and looking over her articles—I noted she was also a very prolific writer; she wrote 16 or 17 law review articles during the time she was on the court, many about women—she was very cognizant of the need to push women ahead in the profession. She wrote a lot of her articles in what was then the *Woman's Law Journal*. She made a lot of speeches, too, many to the National Association of Women Lawyers. She stayed very strong in her commitments to women in the bar right up to the end. ■

ARBITRATION, from page 5

Congress. As Judge Hunter's statement noted, "Back in 1977, while the general concepts of court-annexed arbitration were known, no federal court really had experience with the specifics of how an actual program should be operated. Both the legislative and judicial branches then needed to know more about how such programs would work before declaring them fully acceptable, incorporating them into standard court processes or mandating them by law."

Judges Peckham and Broderick expressed the view that the courts' inherent authority together with rule 16 of the Federal Rules of Civil Procedure constitute sufficient basis for the operation of such programs by the courts. They noted that the FJC is engaged in a study of the court-annexed arbitration programs that have been operated to date.

In March, the Judicial Conference, upon the approval of the Committee on Court Administration, approved draft legislation that would provide statutory authorization for the present experimental program. That draft legislation was presented to the subcommittee at the hearing. ■

FEES, from page 3

for nonpayment. Applying *Pulliam*, Judge Wangelin held that the defendant was liable for attorneys' fees and costs, but reduced the sum requested by the plaintiff from more than $8,000 to $460.

An appeal to the Eighth Circuit Court of Appeals has been filed. ■

BURGER, from page 2

Chief Judge Pierce Lively (6th Cir.)

The close association on the Judicial Conference has given the members of that body an opportunity to see a remarkable judge at work. As a member of the Conference, I have been amazed at Chief Justice Burger's capacity to deal with so many problems and to deal with them so well.

Chief Judge Walter J. Cummings (7th Cir.)

The Chief Justice and I began a warm association 33 years ago in the Justice Department. His close administration of the federal courts is the shining hallmark of his tenure. His friendly cooperation with the circuit chiefs has won reciprocal admiration. His unexpected departure leaves us with a personal loss.

Chief Judge Donald P. Lay (8th Cir.)

Chief Justice Burger deserves a tribute from all Americans for his great service to the Nation. I have never known anyone who thrives on indefatigable energy as he does. The work of a Supreme Court justice by itself requires a full-time effort, yet the Chief Justice has been able to carry on this work and accomplish many other extracurricular tasks as well.

Chief Judge James R. Browning (9th Cir.)

One thing is clear, even now, about history's assessment of Chief Justice Burger: He will surely be recognized as one of our greatest Chief Justices in terms of judicial administration.

Chief Judge William J. Holloway, Jr. (10th Cir.)

Chief Justice Burger has given the Nation's judiciary inspiring leadership. His boundless energy, his dedication to judicial reforms, and his contributions to the improvement of state and federal court relations have significantly advanced our judicial system. We will long benefit from the momentum of his public service.

Chief Judge John Godbold (11th Cir.)

The Chief Justice gave great force and vitality to the goal that the courts perform their functions well. His broad concern embraced all courts, federal and state, and the judges who sit on them and the lawyers who practice before them. The Chief's vision was not limited to today but looked to the future as well. Our country and especially the judiciary will miss his strong voice.

Chief Judge Howard T. Markey (Fed. Cir.)

The Chief Justice will be remembered as a far-thinking administrator who presided over a massive expansion in all segments of the third branch and a simultaneous trebling of its workload. That the judiciary maintained its efficiency and stability throughout that growth period is to the credit of all but in large part reflects the Chief Justice's total dedication to the tasks that confronted him.

Tributes from Past and Present FJC Board Members

Judge Frank Coffin (1st Cir.)

I feel that we are losing the services of a unique institutional leader as well as a constant friend and supporter. Chief Justice Burger has pioneered in seeking to improve the governance of the judiciary to reach out to the public in communicating the needs and responsibility of the judiciary, and to improve the morale of all judges, trial and appellate, state and federal.

Judge Arlin M. Adams (3rd Cir.)

It was with great regret that I learned of the Chief Justice's impending retirement. He has been, to my knowledge, the greatest administrator the Supreme Court and the federal judiciary have known. Indeed, his genuine concern for the jurisprudential, institutional, and personal challenges faced by every American judge has been most remarkable.

Judge Cornelia Kennedy (6th Cir.)

Chief Justice Burger, both by his tireless personal example and through his leadership, contributed enormously not only to the federal courts but also to state courts. His legacy is one of greater court efficiency and a sense of mission and *esprit de corps* which continue to inspire every judge. He has truly been a Chief Justice of the United States.

Chief Judge Aubrey E. Robinson, Jr. (D.D.C.)

The leadership of Chief Justice Warren Burger was an inspiration to all who have had the honor of serving on the Board of the Federal Judicial Center. His boundless energy and deep commitment in working with the Board and staff account for the success of the Center in meeting its responsibility of service to the federal judiciary.

Judge Edward J. Devitt (D. Minn.)

I hate to see the Chief Justice leave the court, but all in all I feel he did the right thing at the right time and for the right reason. The important work of the Bicentennial Commission will be enhanced by his active leadership, just as have all our Nation's courts—state and federal. Chief Justice Burger served as a leader for all courts, not just the Supreme Court, and his leadership will be missed.

Chief Judge Howard C. Bratton (D.N.M.)

History will surely record that Chief Justice Burger's contributions in the field of judicial administration are unequalled. It has been a high privilege to serve on the Board of the Federal Judicial Center with him. Under his guidance the Center has developed from infancy to maturity and has become a valuable resource for the federal judiciary.

Judge William Sessions (W.D. Tex.)

Chief Justice Burger's constant unselfish, inspirational, and extraordinary leadership of the bench and bar has left its indelible imprint on

See BURGER, page 14

SENTENCING, from page 4

Will present prison capacity be the controlling factor in drafting the guidelines?

No. Although present prison capacity will not act as a primary constraint on the formulation of sentencing guidelines, the commission is sensitive to the problem of prison overcrowding. The commission is working with the Bureau of Prisons to assess the impact sentencing under the proposed guidelines will have on prison facilities. Any formulation of responsible public policy must be weighed against all costs involved. As required by statute, alternatives to incarceration are being explored, and the commission is holding a public hearing on sentencing options. As directed by Congress, the commission will make recommendations concerning any needed expansion or change in the nature or capacity of prison facilities resulting from the guidelines (see 28 U.S.C. § 994(g)). Similar consideration and evaluation are being given to the problem of probation workload under the guidelines.

Can payment of a fine or restitution be imposed as a condition of probation?

Yes. The statute provides that a sentencing court may impose a variety of conditions on a sentence of probation (18 U.S.C. § 3563(b)). Payment of fines and restitution to victims are specifically included in this wide range of probationary conditions authorized by the statute (18 U.S.C. § 3563(a)(2)).

What type of sentence may be imposed pursuant to a revocation of probation?

The statute provides that if a defendant violates a condition of probation, the court may either continue or extend the probationary period or it may revoke probation and impose any other sentence available at the time of the initial sentencing (18 U.S.C. § 3565(a)). The commission expects to issue guidelines and/or policy statements regarding resentencing after probation revocation.

Can incarceration be imposed as a condition of probation?

Yes. The statute provides that during the first year of probation, custody may be imposed as a condition of probation for limited intervals of time (18 U.S.C. § 3563(b)). Congress did not carry forward the split sentences provided in 18 U.S.C. § 3651, since, under the new statute, a period of incarceration can be imposed followed by a term of supervised release (18 U.S.C. § 3583). S. Rep. No. 98-225, 98th Cong., 1st Sess., p. 98.

Since parole will be abolished when the guidelines become effective, will there be any form of supervision over defendants after release from prison?

Yes. In addition to a sentence of incarceration, the court may order a period of postrelease supervision by a probation officer according to specified conditions (18 U.S.C. § 3624(e)). The commission expects to provide guidance concerning the appropriate use of supervised release (28 U.S.C. § 994(a)).

If a defendant violates a condition of supervised release, may incarceration be imposed as a sanction?

If incarceration is to be ordered for a violation of a condition of supervised release, the statute requires that it be done pursuant to the contempt power of the court (18 U.S.C. § 3583(e)).

Can incarceration and a fine be imposed in the alternative?

No. The statute expressly precludes such alternative sentencing (18 U.S.C. § 3572(e)). However, under certain circumstances, the failure to make bona fide efforts to pay a fine can result in resentencing to a term of imprisonment (18 U.S.C. § 3614).

Since sentences under the guidelines will be determinate, will a prisoner receive credit for good behavior?

Yes. A prisoner serving a term of imprisonment for more than a year shall receive 54 days' credit toward the service of his sentence each year, unless the Bureau of Prisons determines that, during that year, the prisoner has not satisfactorily complied with institutional disciplinary regulations (18 U.S.C. § 3624(b)). Such credit vests when received and may not later be withdrawn. *Id.*

This provision replaces a confusing array of statutes and administrative procedures concerning the determination of a prisoner's release date. Congress intended to introduce certainty into a prisoner's expected release date by providing a uniform good-time credit and by eliminating artificially high sentences traditionally imposed to counterbalance early release under the parole system. S. Rep. No. 98-225, 98th Cong., 1st Sess., pp. 146–47.

May a court modify a term of imprisonment after imposition?

A term of imprisonment may be modified only under three circumstances: (1) upon the motion of the director of the Bureau of Prisons, if the court finds that extraordinary and compelling reasons warrant reduction and the requested reduction is consistent with applicable policy statements issued by the commis-

See SENTENCING, page 15

BURGER, from page 13

the law and the institutions he touched during his tenure as a great and untiring Chief Justice. I was truly privileged to serve with him on the Board of the Federal Judicial Center.

Judge Walter E. Hoffman (E.D. Va.)

As a former director and Board member of the Federal Judicial Center I have had many contacts with Chief Justice Burger. We are warm personal friends. If anyone has earned his retirement and the right to live a more relaxed life, it is the present Chief Justice. He will go down in history as the most outstanding administrator and leader of the judicial system in the United States. ■

ENTENCING, from page 14

ion; (2) to the limited extent ex-ressly permitted by statute or rule 5 of the Federal Rules of Criminal rocedure to correct error or to rec-gnize postsentence cooperation; or 3) where the defendant has been entenced under a guideline range ubsequently reduced by the com-ission, if such a reduction is con-stent with the commission's stated olicy (18 U.S.C. § 3582(c)).

Will fines play a substantial role in e sentencing guidelines?

Yes. The Sentencing Reform Act ramatically increases the fines that ay be imposed upon a convicted erson or organization (18 U.S.C. 3571). Under the new law, a con-cted person may be fined up to 250,000 for a felony or a mis-emeanor resulting in the loss of hu-an life. For any other mis-emeanor, a person may be fined up $25,000, and for an infraction, up $1,000. An organization may be ned up to $500,000 for a felony or a isdemeanor resulting in the loss of uman life, $100,000 for any other isdemeanor, and $10,000 for an in-action. These substantial increases ovide meaningful sentencing op-ns, which are being carefully con-dered by the commission.

Under what circumstances may a dge deviate from the guidelines?

Although a judge is expected to ntence within the guideline range, e statute provides for exceptions if gravating or mitigating circum-nces "not adequately taken into nsideration by the Sentencing mmission" are found to exist (18 S.C. § 3553(b)). In such excep-nal cases, the judge must explain the record justifiable reasons for t following the guidelines (18 S.C. § 3553(c)). The defendant can peal when sentences exceed the idelines (18 U.S.C. § 3742(a)). th the personal approval of the at-ney general or the solicitor gen-l, the government can appeal en sentences fall below the idelines (18 U.S.C. § 3742(b)).

CIRCUITS, from page 3

ways in which the court of appeals conducts its business and to suggest improvements. Among the issues discussed were briefing, oral argument, and published and unpublished opinions. The session on practice problems in the district courts touched on discovery disputes, methods of resolving other motions, the use of magistrates, judicial involvement in settlement, and the conduct of trials.

Other presentations during the conference included a talk by Judge Marvin E. Aspen (N.D. Ill.) on "Inns of Court," a panel on "The Pros and Cons of a Nationwide United States Trustee System," and a panel on civil RICO issues.

Chief Judge John C. Godbold called into session in Atlanta the fifth Eleventh Circuit judicial conference, with 421 conferees attending.

Justice Lewis Powell, circuit justice for the Eleventh Circuit, addressed the meeting and gave a report on some of the circuit's cases reviewed thus far during the Supreme Court's October 1985 term. He commended the judges of the circuit for their hard work and for what he called "a good record." Justice Harry Blackmun also spoke, outlining the work of the Supreme Court during this term, with emphasis on court matters he felt were of most interest to the Eleventh Circuit judiciary.

In his annual report on the business of the circuit, Chief Judge Godbold gave an explanation of statistical charts on the workload of the circuit and led the conferees through a graphic description of both circuit and national caseloads.

The Eleventh Circuit statistics are impressive. One chart, reflecting national reports on caseloads, shows that the second greatest number of cases filed during calendar year 1985 was filed in the Eleventh Circuit, and the judge pointed out that the circuit judges disposed of "all [this business] with only 12 active and 5 senior judges."

On the district court level, the charts for the calendar year 1985 show that case determinations on the merits per active judge were the highest in the country—approximately 180 per judge—and that median time for final disposition was reduced from 12.7 to 10.4 months.

Chief Judge Godbold called special attention to two matters: First, currently there are more capital cases in the Eleventh Circuit than all the other circuits combined; and second, the work of the state-federal meetings has been enormously productive, especially the certification of state law questions by the high courts of the states. ■

CALENDAR

July 9-10 Judicial Conference Committee on Rules of Practice and Procedure

July 9-11 Seminar for Training Coordinators of the First and Second Circuits

July 9-12 Tenth Circuit Judicial Conference

July 11-13 Seminar for Training Coordinators of the Seventh Circuit

July 14 Judicial Conference Advisory Committee on Codes of Conduct

July 16-18 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

July 21-23 Judicial Conference Committee on Judicial Ethics

July 23-26 Eighth Circuit Judicial Conference

July 28-29 Judicial Conference Committee on Court Administration

July 28-29 Judicial Conference Committee on the Operation of the Jury System

July 28-31 Orientation Seminar for New U.S. Probation and Pretrial Services Officers

July 31-Aug. 1 Judicial Conference Committee on the Administration of the Probation System

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed, gummed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Baker, Thomas E. "Thinking About Federal Jurisdiction—Of Serpents and Swallows." 17 *St. Mary's L.J.* 239 (1986).

Black, Elizabeth. *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black*. Random House, 1986.

Breyer, Stephen. "Economists and Economic Regulations." 47 *University of Pittsburgh L. Rev.* 205 (1985).

Burns, Arnold I. Address on the Constitution and its bicentennial at the Gibraltar Forum, Buffalo, NY, May 2, 1986.

"Construing the Constitution." Addresses by William J. Brennan, Jr., John Paul Stevens, Edwin Meese III. 19 *U.C. Davis L. Rev.* 2, 15, 22 (1985).

Day, David S. "Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota." 31 *South Dakota L. Rev.* 40 (1985).

Haar, Charles M., and Daniel Wm. Fessler. *The Wrong Side of the Tracks. A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality*. Simon & Schuster, 1986.

Henry, James F. "Alternative Dispute Resolution: Meeting the Legal Needs of the 1980's." 1 *Ohio State J. on Dispute Resolution* 113 (1985).

Hill, Alfred. "The Judicial Function in Choice of Law." 85 *Columbia L. Rev.* 1585 (1985).

Hoffman, Peter B., and James L. Beck. "Recidivism Among Released Federal Prisoners: Salient Factor Score and Five-Year Follow-Up." 12 *Criminal Justice & Behavior* 501 (1985).

Kaufman, Irving R. "Must Every Appeal Run the Gamut? The Civil Appeals Management Plan." 95 *Yale L.J.* 755 (1986).

Kaufman, Irving R. "Justice Unfunded Is Justice Undone." *New York Times*, May 25, 1986, at E17.

Kobylka, Joseph F. "The Court, Justice Blackmun, and Federalism: A Subtle Movement With Potentially Great Ramifications." 19 *Creighton L. Rev.* 9 (1985–86).

✓Levin, A. Leo, and Deirdre Golash. "Alternative Dispute Resolution in Federal District Courts." 37 *University of Florida L. Rev.* 29 (1985).

Levine, David I. "Calculating Fees of Special Masters." 37 Hastings L.J. 141 (1985).

Lind, E. Allan, and Benjamin R. Foster. "Alternative Dispute Resolution in the Federal Courts: Public and Private Options." 33 *Federal Bar News & J.* 127 (1986).

Robbins, Ira P. "Privatization of Corrections: Defining the Issues." 69 *Judicature* 324 (1986).

Seron, Carroll. "Magistrates and the Work of Federal Courts: A New Division of Labor." 69 *Judicature* 353 (1986).

Smith, Steven D. "Courts, Creativity, and the Duty to Decide a Case." 1985 *University of Illinois L. Rev.* 573.

Speed, James B., III. "Attorney's Fees Awards in Federal Court: An Arkansas Study." 39 *Arkansas L. Rev.* 99 (1985).

Spiegel, S. Arthur. "Summary Jury Trials." 54 *University of Cincinnati L. Rev.* 829 (1986).

Sullivan, Noel E. "Recent Amendments to the Federal Rules of Civil Procedure: An Overview and Words of Caution." 17 *University of Toledo L. Rev.* 83 (1985).

"Symposium: Gerrymandering and the Courts." 33 *U.C.L.A. L. Rev.* 1–283 (1985).

Twerski, Aaron D. "A Moderate and Restrained Federal Product Liability Bill Targeting the Crisis Areas for Resolution." 18 *University of Michigan J. of Law Reform* 575 (1985).

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THE THIRD BRANCH

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AO Director L. Ralph Mecham Reviews His First Year in the Federal Court System

L. Ralph Mecham, a former university ice president, corporate official, and de to a U.S. senator, became the sixth rector of the Administrative Office on the resignation of William E. Foley st year. Appointment to this office is the Supreme Court.

Mr. Mecham has earned degrees at the niversity of Utah (B.S.), George ashington University (J.D.), and arvard (M.P.A.). His educational ckground also includes congressional d graduate fellowships at Harvard.

July 15 marked your first anniversary as director of the Administrative Office of the U.S. Courts. Did you experience any "surprises" after you became involved in managing the business of the federal courts?

Well, there were both surprises I found and surprises that just happened. I guess the biggest surprise, and probably the one that has been most demanding over this past year, has been the whole matter of Gramm-Rudman-Hollings and what it has done to the judiciary and what has been required as a result for the AO. It has been a big headache. An example is the Executive Committee decision to suspend civil jury trials temporarily because to do otherwise would have meant we would have been in open violation of the Antideficiency Act.

L. Ralph Mecham

One of the interesting things that I found was what I would call a flat versus hierarchical organization. I really hadn't been fully prepared for that, although I guess I should have been, having taught constitutional law and having some familiarity with the courts. Basically, I have never seen an organization where there is less hierarchy and more bosses. I have at least 1,000 bosses that I have to be responsive to, a tremendous amount of responsibility, and very little authority. I don't object to that. I realize the constitutional values of an independent judiciary, but it nonetheless makes for a very interesting and at times difficult

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FJC Completes Transfer of New AIMS to AO

Automation in the federal courts assed an important milestone on ly 1, when the Federal Judicial enter and the Administrative Office completed the transfer of the New Appellate Information Management System (New AIMS) to the AO. The transfer marks the system's transition from developmental to operational status.

New AIMS is an electronic docketing and case management system that eliminates the most burdensome paperwork of the offices of the clerks of the courts of appeals. It operates on computers located and operated in the courts themselves, thus removing the requirement of earlier automated systems for constant telephone connections between the courts and computers located in Washington, D.C.

New AIMS was developed by the FJC in close cooperation with the

See **NEW AIMS, page 8**

Seminar Scheduled for New District Judges

FJC Director A. Leo Levin has announced that the next seminar for newly appointed U.S. district court judges will be held Sept. 22–27, 1986, at Dolley Madison House in Washington.

A reception for the new judges and their families is scheduled for Sunday, Sept. 21, at 6 p.m., and a black tie dinner at the U.S. Supreme Court for Thursday, Sept. 25.

Bicentennial Comm'n Praises Chief Justice

The Commission on the Bicentennial of the Constitution, in a unanimous resolution, has commended Chief Justice Burger for his "act of unsurpassed dedication and patriotism" in announcing his intention to devote his full efforts to his duties as chairman of the commission and retire as Chief Justice. The resolution was adopted at the commission's seventh meeting, held June 20 and 21 in Washington.

At the meeting, the commission concentrated on programs designed to educate the American public about the 200th anniversary of the writing of the Constitution. The commission heard several proposals from private, state-government, and federal agency representatives, all concerned with how their respective groups can contribute to the educational goals of the commission. Eleven state bicentennial commissions (Connecticut, Hawaii, Iowa, Maine, Montana, New Jersey, New Mexico, Oklahoma, Vermont, Wisconsin, and Wyoming) were recognized, and 14 cities and counties were recognized as Bicentennial Communities. The commission also recognized officially a number of projects that involve conferences,

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Commission to Hold Regional Hearings in Fall

This is one of a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

Pursuant to statute, the Sentencing Commission is to submit guidelines to Congress by April

NEWS FROM THE SENTENCING COMMISSION

1987. In order to solicit the widest possible comment on its work, the commission plans to publish a tentative working draft of the guidelines in the *Federal Register* in late September. While not a complete or final document, the draft will be detailed enough to permit substantive discussion of the approach the commission has adopted.

To help facilitate the free exchange of ideas on the guidelines, the commission is scheduling regional hearings across the country. The hearing dates and locations are Oct. 17, Chicago; Oct. 21, New York City; Oct. 29, Atlanta; Nov. 5, Denver; Nov. 18, San Francisco; Dec. 2–3, Washington, D.C.

Based on the comment generated at these regional hearings and through written critiques of the draft guidelines, the commission will amend and refine the guidelines in order to present a final draft to Congress by April 1987. The commission solicits *Third Branch* readers' views now and at any point during the public comment period this fall.

Congress recently sent the President H.R. 4801, a bill making important technical amendments to the Sentencing Reform Act. The key provisions of H.R. 4801 make two modifications of the act's requirement that the maximum term of imprisonment in a range not exceed the minimum term by more than 25 percent. This requirement caused problems with respect to the ranges imposing the longest terms of imprisonment as well as the ranges imposing the shortest terms.

At the top end, the 25 percent limitation created difficulty because there was no way mathematically to compute the minimum term of imprisonment in a range where the maximum term was life imprisonment. H.R. 4801 alleviated this difficulty by providing that "if the minimum term of the range is 30 years or more, the maximum may be life imprisonment."

An amendment made at the low end of the imprisonment ranges will affect an even larger number of cases. The problem caused by the 25 percent limitation at the low end was that the commission would have to create many narrow, impractical guideline prison ranges. For example, if the guidelines provided for a minimum sentence of 30 days then the maximum sentence could only be 37.5 days. These ranges would unduly restrict the discretion of the sentencing judge. Congress responded to this problem by setting the maximum of a range at "the greater of 25 percent or 6 months more than the minimum. This means that if the guidelines called for a minimum sentence of 30 days

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Congress Approves Supplemental Appropriation Funds Available for Civil Jury Trials

Congress has approved and President Reagan has signed the urgent supplemental appropriations bill, H.R. 4515, which provides $3.8 million in supplemental funding for the fees and allowances of jurors. Accordingly, the Judicial Conference's Executive Committee has rescinded its previous advice to suspend civil jury trials.

In addition to funding for jurors, the bill provides for the transfer of $8 million into the appropriation "salaries of supporting personnel" and $3 million into "space and facilities." These transfers were derived from a projected balance in the "salaries of judges" appropriation and from savings achieved through Gramm-Rudman-Hollings reductions in the "expenses of operation and maintenance of the courts" appropriation; they will be applied to personnel salaries and rental of space. This transfer of funds is sufficient to preclude the likelihood of any furlough of personnel at the end of the fiscal year, according L. Ralph Mecham, AO director.

The supplemental approval als contains $1.2 million for an add tional 200 deputy clerk positions ar $1.3 million for a study of the co struction of a new judicia building.

Amendments to Feder Rules of Appellate Procedure Effective

Since Congress took no action defer the effective date of th amendments to the Federal Rules Appellate Procedure that we adopted by the Supreme Court Mar. 10 pursuant to 28 U.S. § 2072, they became effective July 1986, as provided in the Supren Court Order promulgating them (s out in House Document 99–179). copy of this order was forwarded all federal judges and U.S. mag trates in March.

Stoorza Named FJC Systems Div. Director

Edwin L. ("Larry") Stoorza, Jr., is the new director of the FJC's Innovations and Systems Development Division, replacing Gordon Bermant.

Mr. Stoorza came to the FJC in 1976, serving as project leader for the design and development of AIMS and as deputy director of the Innovations and Systems Development Division. In 1981, he joined the AO as chief of the Systems Services Branch to ensure a smooth

Larry Stoorza

courtran transfer and to assist in coordinating the automation activities of the AO and FJC. He then became assistant director of Management Systems and Services of the AO. In that position, he was responsible for directing the activities of the Statistical Analysis and Reports Division, Administrative Services Division, and Systems Services Division.

A native Texan, Mr. Stoorza is a graduate of the University of Oklahoma and was recently promoted to the rank of captain in the U.S. Naval Reserve. ■

Judicial Workload Statistics Published

The *Reports of the Proceedings of the Judicial Conference of the United States,* held in March 1985 and in September 1985, together with the *Annual Report of the Director of the Administrative Office* have been published.

The volume includes an analysis of the workload of the federal courts for the 12-month period ended June 30, 1985. It was prepared by the Statistical Analysis and Reports Division, with appendix tables generated by the Systems Services Division.

Judicial Conf. Certifies Impeachment of Judge May Be Warranted

The Judicial Conference of the United States has certified to the speaker of the House of Representatives that "consideration of the impeachment" of Judge Harry E. Claiborne (D. Nev.) "may be warranted." The certificate was signed by Chief Justice Warren E. Burger on June 30, 1986, and states that on June 18, 1986, the Judicial Council of the Ninth Circuit certified to the Judicial Conference (as provided by 28 U.S.C. § 372(c)(7)(B)) that Judge Claiborne "has engaged in conduct which might constitute grounds for impeachment under Article I of the United States Constitution." The certificate of the Ninth Circuit Judicial Council, dated June 18, 1986, was signed by Chief Judge James R. Browning.

The Judicial Conference's certificate also notes that "in special session by telephonic conference call," the Conference "has exercised its authority under 28 U.S.C. § 372(c)(8) to consider the certificate of the Judicial Council of the Ninth Circuit." The Judicial Conference, acting upon the Ninth Circuit's certificate and upon the certified official records of Judge Claiborne's conviction in the district court, concurred in the Ninth Circuit's determinations.

Judge Claiborne was convicted in the U.S. District Court for the District of Nevada on two counts of violating §7206(1) of the Internal Revenue Code. That conviction became final May 1, 1986, when the district court received the mandate of the U.S. Court of Appeals for the Ninth Circuit, affirming the lower court's judgment. ■

McCafferty Retires as Division Chief at AO

On June 30, James A. McCafferty, chief of the Statistical Analysis and Reports Division of the Administrative Office, retired. His 38 years of government service include 23 years with the AO.

Mr. McCafferty's work with statistics gathering started during his tenure at the U.S. Bureau of Prisons. When the AO's Statistical Analysis and Reports Division was formed in 1977, he was designated division chief.

In submitting his resignation, Mr. McCafferty wrote: "I have seen our technological advances rise from simple manual statistical systems to highly sophisticated communication of data from the courts to the main computer in the division. I have seen the expanded use of federal judicial statistics." Mr. McCafferty also praised the division's staff and their dedicated service.

Mr. McCafferty's service was recognized when AO personnel honored him recently at a luncheon. AO Director L. Ralph Mecham, in addressing the gathering, said, "We are losing a valued employee who has provided dedicated leadership in an area vital to the work of the federal courts." ■

Positions Available

Federal Public Defender, E.D.N.C. Salary to $70,500. Requires law degree and membership in a state bar; five years' criminal practice experience (preferably with significant federal criminal trial experience). Apply by Aug. 31 on form available from J. Rich Leonard, Clerk, U.S. District Court, P.O. Box 25670, Raleigh, NC 27611.

* * *

Federal Public Defender, S.D. W.Va. Salary fixed by 4th Cir. Four-year appointment. Requirements as in above notice; must start work by Oct. 15, 1986. Apply by Aug. 15 on form available from Ronald D. Lawson, Clerk, U.S. District Court, P.O. Box 2546, Charleston, WV 25329.

EQUAL OPPORTUNITY EMPLOYERS

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administrative challenge where you must have management by consensus—a collegial kind of management—where you have to work by consensus and moral suasion.

Do you think the judges don't realize that you have limits on what you can do?

I think, in fact, a few of them do not appreciate it, particularly those who are not involved in Judicial Conference committees or who may not have had experience working with Congress. But there are some very substantial limits on what the AO can do. For example, we are limited by the policies established by the Judicial Conference and its committees. Secondly, I can assure you, we are limited by what Congress does. The classic example is Gramm-Rudman-Hollings itself—plus the whole appropriations process, and not just the money; Congress determines court personnel levels; they determine whether the courts can have probation and the pretrial services in a mixed administration or whether they have to be separate. Almost day to day we must deal with limitations imposed on AO policy by Congress and by the Judicial Conference.

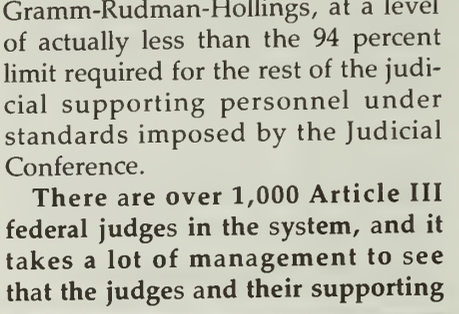
Do most of the questions come from the new judges?

Yes, some are from new judges, but also from a few others who have not had to wrestle with congressional requirements. Moreover, some in the judicial family do not appreciate the other external limits imposed upon us. We have virtually no jurisdiction over buildings for the courts and very little over tenant alterations. That's GSA's role. And, likewise, we have very little to say with respect to the U.S. Marshals Service or the Office of Personnel Management or the General Accounting Office, all of which restrict what we can do in the AO and what the judiciary can do.

What is the complement of personnel in the AO?

Presently we have 538 employees. Our authorized positions are 583. We have been operating, because of Gramm-Rudman-Hollings, at a level of actually less than the 94 percent limit required for the rest of the judicial supporting personnel under standards imposed by the Judicial Conference.

There are over 1,000 Article III federal judges in the system, and it takes a lot of management to see that the judges and their supporting staff have everything they need to process their cases. What are your biggest problems?



L. Ralph Mecham

The biggest problems clearly are: First, to cope with Gramm-Rudman-Hollings; second, to help defend our budget with the appropriations committees and with the budget committees of Congress. We have an excellent budget committee of the Judicial Conference chaired by Chief Judge Charles Clark, who is really a judicial statesman. The AO plays an important role in that. Third is the delicate balancing act to implement policies required by Congress and the Judicial Conference that may not be popular with judicial personnel. The fourth problem is to assist in providing the kind of services that are needed: everything from payroll to personnel to supplies to equipment. One of the major programs we now have is the area of automation. Better than one-third of our budget in the AO goes to help automate the courts' administration.

When a candidate for a judgeship is nominated for appointment to a federal court, do you make contact immediately?

We do. The day after they are nominated I send a letter congratulating them and inviting them to come by the office, perhaps at the time of their Senate confirmation hearings. We then set up briefings. I meet with them personally and Deputy Director Jim Macklin often meets with them as well, and then we have people come in from the personnel division who can acquaint the judges with how they hire, how much they can pay their law clerks and their secretaries, what their benefits may be such as judicial survivors' benefits, travel per diem, subsistence, insurance and that sort of thing. And, of course, we also talk to them about the assistance we can give, of a limited nature, on space requirements. If they are moving into chambers that are being vacated by a judge that is easy. But if they are not, or if it is a new judge where there are no chambers, that is more of a challenge for us.

If they don't have space in the courthouse, do you have to lease space?

GSA must lease space, and that means that sometimes other agencies may be deposed in a federal building that is already occupied. The space problem is one of the most vexing problems facing the judiciary, because for new judges where there is no space available I have heard of delays up to five to six years before they get into the quarters planned for them. GSA feels that it can't begin the real work on a project until a new judge is confirmed and funds are available. At the AO we can do better than that, but our role is narrow.

Currently the courts are functioning under the Five-Year Plan for Automation in the U.S. Courts which is being implemented jointly by the AO and the FJC. Given the constraints of Gramm-Rudman

Hollings, are you able to keep on schedule?

Gramm-Rudman-Hollings has hit this program, too. However, I don't think it has hit the fundamental part of it in a basic way yet. There have been some delays, but we have been able to keep our computer equipment and installation program going at a pretty good clip. We have had to reduce the number of computers that we plan to install this year from 31 to 26, but that is not as bad as it could have been. It has meant that we have had to delay general office equipment and word processing equipment a little more than we would have preferred. And, of course, there had to be some personnel cuts in order to meet our 94 percent quota, so we have had fewer people available for automation functions than we would have liked. As for the New AIMS program for the appellate courts, we were able to accept transfer of that just two days ago from the FJC [see related story, p. 1]. We are making progress. We hope we will be able to continue moving. We will see how Congress treats us during this next fiscal year. It's very important.

"I have at least 1,000 bosses that I have to be responsive to, a tremendous amount of responsibility, and very little authority."

How much is in the AO's fiscal year 1986 budget, and how much do you expect to have for fiscal year 1987?

Our current fiscal year appropriation is about $28 million. That contrasts with a budget for the judiciary overall of $1,031,000,000. So the AO budget is 2.7 percent of the total judiciary budget.

The House Appropriations Committee has approved for the judiciary overall an increase of almost $143 million over fiscal year 1986, for a total budget of about $1,174,000,000. The judiciary got a somewhat larger increase than did the other agencies covered by our appropriation, namely State, Commerce, and Justice Departments; that is, a 14 percent increase. That is less by $54 million than we had asked for, but nonetheless we got the biggest increase, and I feel quite encouraged by it. Big problems remain, of course—the full House, the Senate—and we have to get it by the president. Then we must see what happens when Gramm-Rudman-Hollings, round two, kicks in next Oct. 1.

When the supplemental funds for fiscal year 1986 came through, did that mean that Congress was recognizing the fact that the courts *must* stay open—that judges must be available for certain matters—or did they decide the courts just needed more money?

Well, both, I think. Actually, our Judicial Conference Budget Committee and the AO had anticipated that we would not have enough money for jurors' funds for the fiscal year, and so last February the judiciary asked Congress for additional funds. We alerted the Judicial Conference in March that unless more funds were appropriated the Conference would conceivably have to suspend civil jury trials. So Congress was alerted well in advance, as was the Judicial Conference in March. Both appropriations committees in Congress recognized we must have additional funding, and they approved it. The only trouble came when they included it in the supplemental appropriation bill for fiscal year '86. There were many controversial provisions which caused delays of a month or two in the House and additional delays in the Senate. Consequently, we literally ran out of money for civil jury trials as of June 16 because supplemental money had not yet been appropriated. Congress did appropriate the money and the president, we were told, indicated he would sign the bill, so the Conference was able to lift the suspension. Congress knew we needed the money. They knew that it was vital, but there were these institutional delays that caused the problem. Actually, the courts were open, and even in the regular workaday business civil jury trials are delayed or postponed for a whole variety of reasons. So a brief delay was not a cataclysmic thing, but it was nonetheless very serious because, to my knowledge, this is the first time that civil jury trials have ever had to be deferred because of a lack of funds. It caused serious disruption throughout the judiciary.

"We literally ran out of money for civil trials as of June 16. It caused serious disruption throughout the judiciary."

Have you made any managerial changes since taking office?

Yes, we did indeed make some managerial changes. The Chief Justice expected me to do so, and I am sure others in the judicial branch did as well. They ranged from such things as doing away with an assistant director position to the Chief Justice appointing a committee, chaired by Judge Edward Devitt with three other distinguished judges, to look at the overall management and staffing of the AO. That committee is about ready to report. We have also beefed up our whole space and facilities team, trying to deal with that very difficult challenge posed by GSA and by the necessity to have adequate chambers and courts. I think we have substantially strengthened our legislative response and are supportive of the judiciary in that area. We have tried both to push for and to be more responsive to judges generally, including bankruptcy judges. We have tried to instill an attitude in our

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employees—most of them already had it—to be prompt and polite and professional; to have pride in their work; to be positive and to operate under a rebuttable presumption that if somebody in the courts is requesting something, we would try to get it. And if it was impossible, we would let them know that and why. We've initiated a program of goal-setting on an annual basis with periodic review and objectives. And, of course, we have complied fully with Gramm-Rudman-Hollings, setting staff limits actually below the 94 percent of our authorization. We are adopting zero sum budgeting for the AO so as to justify every dollar that is spent. We do not assume we need the money just because we have had it in the past.

So there have been quite a few management changes, but there are going to be many more and some of them quite soon. I am a great believer in management by objectives. I don't think it is a panacea, but I do think it has value. We did this in the corporation for which I worked, the university where I was vice president, the government agencies where I have served.

Could we talk about the future of the courts? Do you believe the federal court system will continue to grow at the pace it has over the past 20 or so years? Do you anticipate added problems with growth?

Well, district court filings between 1969 and 1985, which is roughly the period of Chief Justice Burger's incumbency, are up 178 percent, appeals filings are up 226 percent, the number of district court judgeships has gone up 69 percent, appellate judgeships have gone up 61 percent. The budget overall for the judiciary has expanded by 720 percent and the major reason is the exploding caseload. I talked to a researcher who is studying this, and he tells me that during Chief Justice Burger's administration there have been 314 statutes passed by Congress which have added to the jurisdiction of the federal judiciary. It is no wonder the caseload has jumped. In my opinion, the courts' jurisdiction will continue to expand until Congress comes up with a dollar figure for each new jurisdictional item they impose on the judiciary and are compelled to provide funding before the law goes into effect. A judicial impact statement is needed. Usually the authorizing legislation is separate from the appropriation. Somehow we have to make those who impose these burdens on the courts realize what they are doing. I would predict a continued increase in court work until such things as diversity jurisdiction are ended. Twenty-five percent of the current caseload comes from diversity disputes. Unless Congress starts cutting back on some of the jurisdiction already given or stops the flow of statutes, I think the judiciary will continue to grow. So the future of the judiciary depends for the most part on what Congress does and what happens in the economy as in the case of bankruptcy cases. Bankruptcy filings, we project, will go up 35 percent this year, a sign of an unhealthy economy, at least in the areas where these filings are taking place. Of course, the courts can do much themselves to improve case management and judicial administration.

"We have tried to instill an attitude in our employees to have pride in their work and to [presume] that if somebody in the courts is requesting something, we would try to get it."

Your position carries with it the title of secretary of the Judicial Conference of the U.S. What responsibilities come with this?

I am indeed secretary, and I regard the secretariat responsibility of the AO to the Judicial Conference and its committees to be of paramount importance, and we give the highest priority to it.

Does the AO staff the committees working on Judicial Conference matters?

We do provide staffing, and I regard this as an essential function for judicial administration in our country. We have certain members of the staff assigned to work with the Judicial Conference as an entity. We serve the Judicial Conference as such and respond to its chairmen and the Chief Justice, and I work very closely with him in that capacity. But each of the committees and subcommittees requires staffing. Jim Macklin, my deputy, for example, works with the rules committees and court administration. Our general counsel staffs the judicial branch committee. We have at least one staff member assigned to every subcommittee and to every committee of the Conference.

Staff members work with the committees and help prepare the agenda. They handle the information flow to the committee members. They are responsive to the requests of the chairmen. They may be involved in setting up studies. They help in arranging the meetings which are held by the committees and subcommittees, and handle the logistics involved. It's a major responsibility and it's a very important one.

Could you describe how the AO cooperates with the Conference committees in drafting legislation to be proposed to Congress?

Well, it happens two ways. Often we will have requests from Congress to comment on specific legislation, and in response to that request, the AO, working with the Conference committee chairmen and the subcommittees, will endeavor to frame a response. It might just be a letter commenting on a bill, or it may be actually writing amendments. That's one aspect of it. The other aspect is that the Conference itself will, as part of the committee process, or on its own initiative, propose legisla-

tion, and then it is necessary to draft implementing bills. Some typical recent examples: bankruptcy judgeship legislation and retirement of magistrates, bankruptcy judges, Claims Court judges, and others. On behalf of the Conference, I submit Conference-approved legislation to Congress, and usually members agree to sponsor it.

What happens if you learn that specific legislation has already been introduced that you believe will pose a great problem for the federal courts?

Usually we would alert the relevant committees of the Conference, if they were not already apprised of it, and a suitable response will then be framed. If there is time, it will go up through the normal committee procedures. Sometimes we have to make some ad hoc decisions in response to an emergency. Usually, though, it will involve an issue where we already have policy guidance of some kind from the Conference, or we can get it presently from the committees and subcommittees. Yes, we would respond. However, I must also say that if it impacts the judiciary, most frequently we will receive a request from the congressional committees for action. Of course, there are times when amendments are offered on the floor of the House or the Senate, particularly in the Senate where the rules are much looser on germaneness and where discipline is much less tight. There, an amendment can be offered without our having any chance to respond at all. No forewarning at all. To illustrate, some poor amendments were added to the bankruptcy judgeship bill in the Senate that the Conference opposed, and we didn't know they were coming up. We do have an opportunity to seek some corrective action in the House, but had the amendments come on a House-passed bill then the only recourse would be to the Senate and House conferees.

The chairman of the House Judiciary Committee has said he will initiate impeachment procedures in the House against a federal judge. Will the AO get involved in any way?

In fact, the AO was asked several questions by Chairman Kastenmeier of the House subcommittee which handled the Judge Claiborne matter in the House. As you know, the House performs the equivalent of a grand jury function in the impeachment process, and we received many questions and worked cooperatively with the chief judge and clerk of the court in Las Vegas, Nev., and with Chief Judge Browning in providing information to the committee. We don't know what we will be asked to do by the Senate. On July 1, a certificate was delivered to the speaker of the House certifying at the direction and on behalf of the Judicial Conference, which held an emergency meeting on June 27, that the Conference had determined that there might be grounds for impeachment. Similar action had been taken previously by the Ninth Circuit. The Chief Justice conveyed the Ninth Circuit's certification along with that of the Conference to the House [see related story, p. 3].

"There have been quite a few management changes, but there are going to be many more and some of them quite soon."

Is there anything in the federal court system you would like to see changed?

As for management improvements, the field is "white already to harvest" in the AO. We have many great people. But we have probably done a better job in trying to help the courts improve management, for example in the area of automation, than we have helped ourselves. We don't have a five-year automation or management plan for the AO and we are going to have one for automation, word processing, and for management generally. Fortunately, we have many good people who work effectively with those resources we do have. Then, too, the courts can improve their management. Chief Justice Burger certainly has done more than anyone I know to try to make all participants in the judicial family management-conscious. Obviously this has to be done in a collegial way; it can't be imposed on anyone. But that clearly is something, I think, where the judicial branch can do a better job.

You asked for a sort of "legislative wish list." I think that increasingly the judiciary should be able to control its own destiny with fewer outside controls. Some of my staff disagree with me in part, but I think more and more we need to get control of the money for buildings and for tenants' alterations, and perhaps contract out projects instead of having to go through GSA. Secondly, in the AO we need to be under the same personnel system the rest of the judiciary is. We have the anomaly of having great difficulty in hiring people from the courts because they are not under the competitive system. The judiciary ought to have its own personnel system. We shouldn't have to follow all the red tape that the Office of Personnel Management imposes. That's got to change. We must improve our relationships between the courts and the AO and the U.S. Marshals Service. I hope we can do a better job at that. The police function is in the executive branch and ought to be there, but I believe we can work more closely.

Would you change the security system for the judiciary?

You are talking now about personal security? I think the Marshals Service generally does a good job, but Gramm-Rudman-Hollings cuts had to be made by the marshals; then with the AO, they had to cut back the number of court security officers and, lastly, the number of GSA guards was reduced. I've got to

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believe that the cumulative effect was to reduce security for judges generally. It's a very difficult problem and adds to the inherent tension which arises with dual administration.

Another area, and I should have perhaps mentioned this first: I hope the Quadrennial Commission will take steps to raise judicial salaries along with congressional salaries and those for political appointees of the executive branch. I think it has to be done. I know it's difficult to do that when you have the specter of Gramm-Rudman-Hollings and large deficits hanging fire over the economy. But I think it must happen if the country is to attract the best judges and keep those we have now. Judges need to have financial security. I recognize they are not going to be paid as much as they would if they were in the private practice of law, and they know that. They're public-spirited or they would not be in the jobs they are in. But there's an important area where we must have a major breakthrough, and that's the area of salaries for judges and for the judicial system generally.

Because of inflation since 1969, judges' salaries have gone down in real dollars substantially. If they were being paid at 1969 rates, in 1985 dollars a district judge would receive about $130,000 and a circuit judge $137,000. In fairness they ought to be paid at least that much just to stay even. Last year we gained a major legislative breakthrough on travel and subsistence. The benefits will commence Oct. 1, 1986. For example, a judge coming to Washington, D.C., on judicial business is probably going to get more than twice (if he or she itemizes expenses) as much as the judge is able to get now. ■

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for a particular minor offense, the Commission will have the authority to authorize a maximum guideline sentence of seven months. ■

BICENTENNIAL, from page 1

broadcasts, lecture series, and other forums for educating the public about the Constitution.

Senator Dennis DeConcini (D-Ariz.), ranking minority member of the Senate Judiciary Committee Constitution Subcommittee, was introduced as a new member of the commission, replacing Washington attorney Edward P. Morgan, who died in March. ■

NEW AIMS, from page 1

Fourth, Ninth, and Tenth Circuit Courts of Appeals, which acted as pilot courts for this project. The Center and the pilot courts were joined by representatives from the other circuits and from the AO at critical points in the planning and development of the system.

The major advantage New AIMS brings to the court is its powerful ability to generate schedules, forms, and reports directly from the accumulation and processing of coded docket entries. New AIMS is intentionally open-ended in its design, which means that courts can increase their uses of it as they become more familiar with its features. The Center is now incorporating many of the features and capabilities of New AIMS into systems under development for the district and bankruptcy courts. New AIMS thus brings an indirect benefit to these other courts as well. The AO is currently working with the Second, Sixth, and Seventh Circuits on schedules for the installation of New AIMS in those courts. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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Judge Frank Johnson Discusses Civil Rights in the Sixties; Prison Reform in Alabama

Judge Frank M. Johnson, Jr., is a native of Alabama and received his LL.B from the University of Alabama in 1943.

The judge's federal career began with his appointment as U.S. attorney for the Northern District of Alabama in 1953. After two years he was appointed to the U.S. District Court, where he served until 1979, when he was elevated to the Fifth Circuit. When the Fifth Circuit was restructured in 1981, Alabama became part of the new Eleventh Circuit.

Though he is well known for his civil rights decisions, those cases are only a part of over 30 years' outstanding service on the federal bench, a fact recognized when he was given the prestigious Devitt Award in 1985.

Your early years were spent in Winston County, Alabama. Did this community affect your approach to the law and to deciding constitutional issues?

I think background affects everyone. Northwest Alabama, where Winston County is situated, was inhabited back in the early 1800s by remnants of Andrew Jackson's army after he had been down to fight the Creek Indians. Land in Tennessee at that time was selling for $2 and $3 an acre but you could buy land in Winston County for 5 cents and 10 cents an acre. Many of Jackson's men went back to Tennessee and got their families and returned to northwest Alabama, where they bought small parcels of land—something that they could farm on their own. Slavery wasn't known in that part of the state, so if your farm was tended, you tended it.

Judge Frank M. Johnson, Jr.

This was subsistence farming?

Absolutely. The people in Winston County adhered rather fervently to the Jacksonian philosophy out of fierce loyalty to the national government. The most dramatic example of that was about the time the

See **JOHNSON, page 4**

House Approves More Bankruptcy Judgeships

On Aug. 5, the House approved H.R. 5316, a bill to authorize 52 additional bankruptcy judgeships and to make permanent the U.S. trustee program for the administration of bankruptcy estates under the Department of Justice, mandating the program in every judicial district.

During House and Senate hearings on the bill, Judge Robert E. DeMascio (E.D. Mich.), chairman of the Judicial Conference's bankruptcy committee, summarized the Conference's objections to the U.S. trustee program.

Judge DeMascio noted that housing the program in the Department of Justice, which in many cases represents the interests of executive branch agencies as creditors of the estate, creates conflicts of interest. He further noted the cost of the U.S. trustee program. Because providing sufficient staff support at all the locations where bankruptcy judges sit on a regular basis would be too expensive for the department, its travel costs will increase and delays in cases can be expected. The U.S. trustees will have to duplicate the efforts of the clerk's offices, other Justice Department lawyers, and personnel of such other agencies as the IRS. The national U.S. trustee program is now estimated to cost more than $50 million on a regular basis; Judge DeMascio stated the Conference's opinion that a similar program operated in the judiciary

See **BANKRUPTCY, page 12**

Center Publishes Two Bibliographies on the Bicentennial of the U.S. Constitution

The Center has recently issued two publications related to the bicentennial of the United States Constitution.

The Writing and Ratification of the U.S. Constitution: An Abbreviated Bibliography is a brief annotated list of seventeen books and articles on the Philadelphia Convention of 1787, its causes, and subsequent events.

The Writing and Ratification of the U.S. Constitution: A Bibliography, by Russell R. Wheeler, is a more extensive bibliography on the subject, consisting of 44 pages. This publication deals mainly with the founding period but also includes, more broadly, some literature on American constitutional history. The abbreviated bibliography mentioned above is included in this larger version. Both versions include a 2-page chronology of events of the founding period.

The bibliographies were prepared by the Center to assist federal judges and other members of the federal judicial system with their participation in the celebration of the bicentennial of the Constitution.

A copy of either or both of these bibliographies can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz. for the shorter version; 8 oz. for the longer). Please do not send an envelope.

Sentencing Commission Asks for Outside Input

This is one of a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

The U.S. Sentencing Commission continues to solicit the widest possible comment on its work. To this end, it will publish working draft guidelines for public comment in late September in the *Federal Register*. While not a complete or final document, the working draft will be detailed enough to allow meaningful evaluation. It will also identify important issues that the commission

NEWS FROM THE SENTENCING COMMISSION

believes need more extensive public input. The commission stresses that changes in the draft will be made up until the time the guidelines are submitted to Congress next year.

The Sentencing Commission urges interested parties to study the draft after its publication and submit written suggestions on how to improve it. Chairman William W. Wilkins, Jr., emphasized that the "guidelines should reflect the combined efforts of as many interested people as possible."

In conjunction with publication of the working draft, the commission is planning a series of public hearings across the country, which the commission hopes interested individuals will plan to attend. Dates for the hearings were listed in the August issue of *The Third Branch*. Further details, including the specific location of each hearing, will be provided as the information becomes available.

* * *

The Sentencing Commission's most recent public hearing on July 15 generated wide-ranging opinions on the sentencing options that are available and appropriate for defendants convicted of federal offenses. Testifying at the hearing, Assistant Attorney General Douglas Ginsburg of the Justice Department's Antitrust Division argued for mandatory jail terms for most Sherman Act violators, including first-time price-fixers. While serving to punish the offender, a prison sentence would also act as a deterrent to others contemplating similar criminal activity, he said. "Deterrence is the primary goal of criminal antitrust enforcement, and we are convinced that accomplishing this goal requires the use of very substantial penalties in the form of both fines and imprisonment," Ginsburg testified.

Herb Hoelter and Marcia Shein, representing the National Association of Criminal Defense Lawyers, argued for more emphasis on alternative sentencing and less on imprisonment. "There is no evidence that longer prison sentences provide greater deterrence than shorter ones," Ms. Shein said.

The commission's fifth hearing is scheduled for Sept. 23, 1986, in Washington, D.C., and will deal with the topic of plea negotiations. ■

THE THIRD BRANCH

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Nominations to State Justice Institute Board

President Reagan in July nominated 9 of the 11-member Board of Directors of the State Justice Institute, subject to Senate confirmation. Two remaining appointments are to be made—one from the public sector, the other from the judiciary.

Creation of the State Justice Institute was proposed by the Conference of Chief Justices in 1979, and the institute was established by statute in 1984. Under this legislation, it is authorized to make grants to support the state courts, law schools, national nonprofit organizations, and other groups working in the areas of judicial administration, continuing judicial education and training, and judicial research.

Though President Reagan proposed a recission of the institute's fiscal 1986 funds, Congress did not approve it. Thus, although the $8 million appropriated for fiscal year 1986 remains available until Sept. 30, the institute probably will not have time to spend or obligate most of that amount before the beginning of fiscal year 1987. Any unspent or unobligated fiscal year 1986 funds would revert to the Treasury on Sept. 30. ■

ABA House Receives Report on Professionalism

A special commission of the American Bar Association has recommended changes directed at improving the professionalism of law schools, practicing lawyers, and judges. The commission was formed in February 1985 following Chief Justice Burger's call for a study to determine whether practicing lawyers are "moving away from the principles of professionalism." John C. Shepherd, then ABA president, agreed with the need for such a study, and the commission was constituted under the chairmanship of former ABA president Justin A. Stanley.

The commission's 155-page report contains recommendations directed to law schools, practicing lawyers, bar associations, and judges. The report recommends improved coverage of ethics in law schools, higher standards for law school admissions, more and better continuing education for practicing lawyers, more understandable, and written, fee arrangements with clients, and strict use of sanctions for errant lawyers by the judiciary (with an added recommendation that state courts adopt a rule similar to Federal Rule of Civil Procedure 11). The report emphasizes the need to educate the public about the legal profession, since much of the criticism leveled at lawyers and judges results from a lack of knowledge as to how the judicial systems—state and federal—function.

Members of the ABA House of Delegates considered the report at the ABA's annual meeting last month. The report will now be distributed to bar associations and the judiciary. ■

Parole Commission Cracks Down on Crack

The U.S. Parole Commission has proposed amending its parole policy guidelines so as to sanction more appropriately offenses related to the form of cocaine popularly known as "crack." The commission has solicited public comments on the content of the proposed guidelines.

The current guidelines, contained in 28 C.F.R. § 2.20, include an Offense Behavior Severity Index to assist in categorizing the severity of various forms of criminal conduct. Although examples relating to cocaine offenses exist, separate guidelines are believed necessary in light of differences between ordinary forms of cocaine and the more potent crack. For example, the present guidelines for heroin and opiate offenses take into account the relative potencies of heroin and Dilaudid, and multiply distributed amounts of Dilaudid by a factor of two to convert such amounts to their heroin equivalents. A similar conversion factor might be appropriate for crack, the Parole Commission belives. Guidelines that reflect the smaller quantities involved in trafficking in the more potent crack might also be developed. In addition, because of the difficulty of analyzing the purity of small amounts of crack, the guidelines for crack may need to take account of its weight alone, rather than both its weight and its purity, the factors assessed for heroin and ordinary cocaine.

House Cuts Appropriations for Judiciary; Final Word Rests with the Senate

The House of Representatives has approved and sent to the Senate a bill that includes appropriations for the judiciary in the amount of $1,103,017,000 (exclusive of the Supreme Court). This figure is $107,080,000, or 9 percent, less than the judiciary had requested.

The reduction came about in two ways. The House Appropriations Committee in July cut $53,297,000 from the judiciary's request. In addition, the bill for the Commerce, Justice, and State Departments and the judiciary as passed by the full House included an amendment introduced by Congressman Bill Frenzel (R-Minn.) that provides for a further reduction of 5.03 percent in the judiciary's appropriations (with the exception of salaries of Article III judges). The Frenzel amendment thus further reduced the funds available to the judiciary (exclusive of the Supreme Court) for fiscal year 1987 by an additional $53.8 million.

On July 22, AO Director L. Ralph Mecham, on behalf of the Judicial Conference's Budget Committee, wrote to Senator Warren B. Rudman (R-N.H.), chairman of the Senate Committee on Appropriations, asking that the committee amend the bill to exempt the judiciary from the provisions of the Frenzel amendment. The amount approved by the House Appropriations Committee before the amendment—$53,297,000 less than requested—is "the bare minimum amount required by the courts and related agencies to fulfill their basic mission," Mecham said.

On Aug. 14 the Senate Appropriations Committee struck the Frenzel amendment and voted to restore $50,699,000 of the funds cut. ■

Impeachment Papers Received by Senate

On July 22, the House of Representatives unanimously voted four articles of impeachment against Judge Harry Claiborne (D. Nev.). Chief Justice Burger, on behalf of the Judicial Conference of the United States, had previously certified to the speaker of the House that the Conference and the Judicial Council of the Ninth Circuit had determined that there might be grounds for impeachment (see August *The Third Branch*).

On August 6, members of the House of Representatives formally

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JOHNSON, from page 1

Civil War started. The state of Alabama seceded from the Union; the state legislature passed a secession resolution. The people in Winston County met and they passed a secession resolution of their own; the theory behind it was that if the state of Alabama as a political entity of the national government had a right to withdraw by secession resolution, then Winston County as a political entity of the state of Alabama had the same right to withdraw from the state—and they did. They passed a resolution that read like this: "We agree with Jackson," meaning Andrew Jackson, "that no state can legally get out of the Union, but if we're mistaken in this and a state can lawfully and legally secede or withdraw from being a part of the Union, then any county being a part of the state, by the same process of reasoning, could cease to be part of the state. We think that our neighbors in the South made a great mistake when they attempted to secede and set up a new government. However, we do not desire to see our neighbors in the South mistreated and therefore we are not going to take up arms against them, but on the other hand we are not going to shoot at the flag of our fathers, Old Glory, the flag of Washington, the flag of Jefferson, the flag of Jackson. Therefore, we ask that the Confederacy on the one hand, and the Union on the other hand, leave us alone, leave us unmolested so that we may work out our political and financial destiny here in the hills of northwest Alabama." That is the reason they called the county the Free State of Winston. And, of course, that is a part of my heritage.

So they were a county, but not a part of Alabama?

Well, after the Civil War was over everyone ignored it. But that demonstrates their attitude. During the war the Confederacy sent press forces in there to impress the men who were eligible or who they thought were eligible into the Confederate Army. Most of the men went through what they called the underground and joined the Union forces; a lot of my forefathers fought for the Union forces. On the other hand, some of them were officers in the Confederate Army. It was a divided family.

The ordinary citizen up there has an individual strength. They have

Judge Frank M. Johnson, Jr.

integrity. They believe in the personal integrity of the individual and they all respect it.

Those were the kinds of people who through their integrity and fortitude helped establish our country.

That's right. Those people were not then, and many of them aren't now, highly educated in the formal sense, but they are highly intelligent and they have a deep respect for the rights of the individual.

Do you have any kin there now?

Most of them have left. I may have been the last one to leave there, when I was appointed to the federal bench and moved to Montgomery in 1955.

You were U.S. attorney from 1953 to 1955. Were civil rights cases filed when you were in this office? If so, would you say that this experience prepared you for the civil rights issues that you handled on the district court?

Well, I handled some civil rights cases during the time I was U.S. attorney. During that time my headquarters were in Birmingham. A lot of these cases were section 241 and 242 cases. However, I guess the most dramatic case that I prosecuted when I was U.S. attorney was *United States v. Fred & Oscar Dial*. The Dial family was a very prominent family from down in Sumter County, Alabama. Sumter County is the southernmost county in the Northern District of Alabama, and some of the plantation owners had a practice at that time, according to the evidence, of going over to Meridian, Mississippi, which wasn't far from Sumter County, and they would find healthy, strong black men who had been convicted by the justice of the peace courts and sentenced to jail because they hadn't paid their debts. These people would go to the court and pay what was owed and take custody of the blacks at the jail and take them back to their large plantations in Sumter County, Alabama. Then they would go and get the families of these men and bring them to their plantations. The only subsistence the blacks had was from the plantation store. If they attempted to run off from the plantation, the owners would take their bloodhounds and they would get them in the swamps, there along the Tombigbee River. It was in 1954 when I prosecuted this case that primarily concerned one fellow, black, by the name of Monk Thompson, who had run away from the plantation. They took the dogs and they found him in the swamp and they brought him back and they strapped him, according to the evidence, to a bale of hay and they whipped him with a bullwhip. He died. His body wound up in a funeral home in Livingston, Alabama, which is also in Sumter County, and the people in the funeral home took a picture of the body and sent the photograph to me as the U.S. attorney. I sent the FBI down there and they investigated it; the grand jury indicted them, and I prosecuted them for involuntary servitude, for peonage, and for slavery. The defendants

hired the most prominent law firm in the South to represent them, and the case lasted a full week. Judge Seybourn Lynne, who went on the bench a few years before I did, was the trial judge. The jury convicted them, and the judge sent them to the penitentiary for the conviction of involuntary servitude. That's one experience that caused me not to be too surprised at some of the things I ran into when I became U.S. district judge in 1955.

If things like this were going on, why didn't your predecessors in office do something about it?

Well, I don't know whether it was reported to them as dramatically as it was reported to me, which was by a picture of a dead black man with bullwhip stripes all over his body. And I had access to a good FBI agent that I sent down there, and he made a very, very thorough investigation. The grand jurors were incensed when I presented the case to the grand jury, and the verdict reflects the petit jury was also incensed.

We had other cases, of course. We had section 242 cases—violations where law enforcement officers would discriminate against blacks and summarily punish them after they had been legally arrested, things like that. Those were misdemeanor cases.

I'd like to go into the early civil rights cases you handled and your personal reactions to the tasks before you. The Supreme Court decisions were definite in what they said, but they were not specifically tailored to the cases you handled.

The Supreme Court didn't decide *Brown v. Board of Education* until 1954, and I was U.S. attorney in Birmingham at that time. When I was appointed a federal district judge I moved to a new district. It was the second time in the history of the country that that had ever occurred. I suppose it is just politically expedient to appoint judges from the district where they are to serve. The first time a federal judge was appointed to a district other than where he resided occurred in Tennessee, when President Hoover appointed a judge to the Western District of Tennessee when he lived over in the Eastern District. The second time was when President Eisenhower appointed me from the Northern District of Alabama to the Middle District of Alabama. I was

Judge Frank M. Johnson, Jr.

the only judge in the Middle District. My predecessor had died five or six months before I was sworn in. When I moved to Montgomery, the headquarters for the district court, Circuit Judge Richard T. Rives had been on the bench four years. President Harry Truman appointed him, and Judge Rives and I served together on many three-judge cases. The first one we served on was with Judge Seybourn Lynne (the trial judge in the *Dial* case), in 1956, *Browder v. Gayle*. This was after Martin Luther King had made his presence on the scene in Montgomery, and after he established the bus boycott. City and state officials refused to allow the black people to sit in front of a certain line on the buses. There was clear precedent for segregating on the basis of race because the Supreme Court in the 1890s had decided *Plessy v. Ferguson* and that *was* a public transportation case. The first Justice Harlan dissented in that case, a prescient and beautifully written dissent. The law is now settled that you cannot in any public facility discriminate on the basis of race without violating the Fourteenth Amendment to the Constitution of the United States. However, it was not settled in 1956. We heard oral arguments in the *Browder* case after it had been pleaded to the point that the parties joined issue as to the constitutionality of the public transportation ordinances and state statutes that segregated people on the basis of race. Judge Rives and I wrote an opinion declaring the public transportation segregation laws unconstitutional. We didn't deal with enforced segregation in all public facilities specifically because the issue wasn't before us, but the decision laid the groundwork for other public facility cases being decided contrary to the *Plessy* rationale. *Plessy* had not been overruled except as to the operation of public education facilities—the only issue before the Supreme Court in *Brown v. Board of Education*. In *Brown* the Supreme Court did not overrule *Plessy*, so the lower federal courts were left with a *Plessy* case and left with a Supreme Court decision outlawing segregation in public schools, and that's where we were when we heard arguments and had our postargument conference in *Browder*.

Judge Rives and I decided that there was a doctrinal trend reflected by the Supreme Court's decision in *Brown* that made *Plessy* no longer the law, and we declined to follow it. We declared unconstitutional and enjoined segregation in public transportation facilities in Alabama. Judge Lynne dissented. He had a very valid, legal basis for dissenting because *Plessy* had not been overruled. But as it turned out the *Browder* case went up on appeal and the Supreme Court affirmed what Judge Rives and I had held. Hindsight tells us that we were right in perceiving a doctrinal trend and going along and not waiting for them to overrule *Plessy*.

See JOHNSON, page 6

JOHNSON, from page 5

You made history.

Well, as future challenges were presented we went from there to all aspects of public facilities—airports, public parks, restrooms in public facilities, restaurants functioning in interstate commerce; and then the district judges were required to commence the implementation of *Brown v. Board of Education*. I didn't have any real problems in these cases involving segregation on the basis of race in public institutions or in institutions operated as public facilities as far as the law was concerned. It was one of the most basic things, according to my concept of the Constitution, that you can't discriminate against a citizen in the use of public facilities whether it is a school, whether it is buses, whether it is libraries, whether it is public parks. Regardless of what the public facility is, if you discriminate in its use or availability on the basis of race, you are violating the Fourteenth Amendment. So that is the basis on which I have always put such decisions.

It took some courage though.

Well, I don't know. When you look back on it you say, "Well, why did I do that?" And then you ask yourself, "What alternative did I have?" As long as I remained a federal judge and adhered to the oath that I had taken, I had no option.

How did you three judges go about deciding *Browder*?

Judges on multijudge courts do not confer before they have studied the briefs and heard the oral arguments. They do not start conferring until there is a complete submission. After we had completed the oral arguments in *Browder v. Gayle*, we went to chambers and, as is the practice, the presiding judge called upon the junior judge to express himself. That practice is followed to keep the junior judge from being swayed or being intimidated by a senior judge expressing his position first. So Judge Rives as presiding judge said, "Well, Frank, what do you think about this case?" I responded to the effect that in my opinion discrimination on the basis of race in the use or availability of public facilities—and this certainly includes public transportation facilities—violates constitutional rights under the Fourteenth Amendment to the Constitution of the United States. The evidence was clear and really not controverted that these black citizens were being discriminated against in the use of these public facilities, and they were being discriminated against by a public entity, the city of Montgomery and the state of Alabama, in the use of these public facilities solely because of their race, and I said, "If I can read the Constitution of the United States, that is unconstitutional. That's the way I vote."

"When you look back on it you say, 'Well, why did I do that?' And then you ask yourself, 'What alternative did I have?'"

And he said, "You are right"?

That's right. These cases get easy when they were decided 25 to 30 years ago, you know.

There were some turbulent years for you as you pioneered in the civil rights area—a cross was burned on your lawn, your mother's home was dynamited. How did you cope with all this?

The years were to some extent turbulent, but I had no difficulty coping with the problems. Federal judges are now and were then given a lot of authority. They were given that authority deliberately. Federal judges were appointed for life, "during good behavior," and that is designed to insulate them from social pressures and insulate them from political pressures. That insulation is not given to them because the framers of the Constitution admired judges or just wanted to favor them with lifetime tenure; it is given to them so they can act impartially, so they can decide cases as the facts and the law require they be decided, and in doing so do not have to fear any social, economic, or political pressures. Those protections make it easy for a judge, who has the desire, to correctly decide cases that involve constitutional principles on the basis of the Constitution. When a person accepts an appointment as a United States judge—district judge, circuit judge, or Supreme Court justice—he or she implicitly agrees with the government and the people of this country that if appointed as federal judge—to a position that gives a lifetime tenure, that insulates from all of these pressures whether they be social, political, or economic—that if given these insulations he or she will decide the cases impartially; will decide these cases according to the Constitution, regardless of the consequences. That's always been my attitude. It still is, and with that attitude it is not difficult to cope with the cases even if they do involve some pressures.

Did you lose some friends?

Well, I have been asked that question many times. And this is not a trite answer. It's a real genuine feeling that if I lost any friends, the friends weren't worthy of being friends. If I lost them because of de-

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Cook New Chief of AO Division

David L. Cook was appointed chief of the Administrative Office's Statistical Analysis and Reports Division, effective July 14, 1986. Mr. Cook has been with the AO since February 1972. He was promoted to the position of assistant chief of the Statistical Analysis and Reports Branch in January 1977.

OHNSON, from page 6

isions I made in cases that were initiated by parties over whom I had no control, cases that concerned matters over which the court had jurisdiction, cases that had to be decided—it didn't bother me if someone didn't like it. Some people still don't like some decisions that federal judges make. That wasn't unique to the late 50s and the 60s and the early 70s.

I'd like to make a point before we leave this question. Neither Mrs. Johnson, I, nor our son ever felt ostracized. We had and continue to have very close friends throughout the state, throughout the South and the nation; people whom we wanted to be friends with and whose friendship we continue to enjoy and treasure. As for people whom we didn't want to be friends with, we did our own ostracizing and we did even before I became a federal judge and before we moved to Montgomery in 1955, and we still do.

Were your colleagues on the bench supportive? Did any of them come and say, "I know you are going through a lot"?

Well, it's hard for one judge to support another judge. You know they know what the problems are, you know they know what the duty is that's on the judge to decide the case. They know that he didn't initiate the litigation or formulate the issues. Judge Rives and I were very close friends, and my wife and Mrs. Rives were very close. Judge Lynne and I were always friends and we still are. I started trying cases in the federal court before Judge Lynne. He went on the bench ten years before I did, so I've always admired him as a judge and as a person, and we have always been very close. Judge Hobart Grooms was and is a close friend also. He went on the federal bench the same day I was sworn in as U.S. attorney in 1953. He was subjected to a lot of hassling up in the Birmingham area. The fact that I may have been subjected to some criticism in the press didn't make me unique, because other judges were being subjected to the same type of criticism. You might say we were all supportive of each other.

Did you have any protection or court security in the 50s and 60s?

We had very adequate security during what you referred to as the "turbulent years" in the late 1950s and 1960s. The U.S. Marshals Service was most supportive. You didn't have marshals who did not go into the courtroom then. They went into the courtroom in all instances. The FBI gave federal judges security if there was any indication that some federal law was being violated or a violation was contemplated. If we had a highly emotional situation or some situation that the Marshals Service or the FBI thought was volatile and the risk was pretty high, we had officers who afforded the necessary security. After my father died, my mother's home was dynamited, and there was no question but that it was dynamited because I had and have the same name as my father and his address was listed in the telephone book; the bombing was designed to intimidate and harass me. The FBI and the marshals gave my mother protection for as long as she would tolerate it. She said they kept her awake at night slamming doors and shining lights around the house. She eventually requested that they be removed from the immediate area.

"The fact that I may have been subjected to some criticism in the press didn't make me unique, because other judges were being subjected to the same type of criticism."

Do you think there are issues today that are as emotional as the civil rights cases?

Absolutely. For example, death penalty cases are just as emotional. Judges are still subjected to criticism based in whole or at least in part on an emotionalism that attends the decisions when federal judges set aside convictions in death cases and order retrial. The criticism is sometimes

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Study of Standard Pretrial Procedures Published

The Center recently published *The Use of Standard Pretrial Procedures: An Assessment of Local Rule 235 of the Northern District of Georgia*, by Carroll Seron of the Center's Research Division.

In January 1985, judges in the Northern District of Georgia adopted local rule 235, which applies a standard pretrial procedure to nearly all cases filed in the district. The rule requires lawyers to hold a settlement conference and provide a certificate of settlement activity, a preliminary statement of the case as it stands after the settlement conference, a list of all interested parties that discloses potential conflicts, and a final pretrial order on an established form. The rule was adopted as part of a general revision of the district's rules; other rules cover such matters as discovery limitations and motions practice. Local rule 235 is a clear example of a court's effort to comply with the requirements of rule 16 of the Federal Rules of Civil Procedure while minimizing the early involvement of judges.

The paper describes the factors that led to the district's decision to standardize its procedures and the steps taken to bring the changes about. A primary goal of the paper is to present the judges' assessment of the various aspects of their program based on one year's experience with it. Judges considering changes in their case management practices may find the Georgia experience instructive.

Copies of the report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005.

PERSONNEL

Nominations

Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, July 28

Joel F. Dubina, U.S. District Judge, M.D. Ala., July 30

James K. Porter, U.S. District Judge, E.D. Tenn., July 30

Confirmation

Daniel A. Manion, U.S. Circuit Judge, 7th Cir., June 26

Appointments

Con. G. Cholakis, U.S. District Judge, N.D.N.Y., May 29

Robert J. Bryan, U.S. District Judge, W.D. Wash., June 2

Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., June 6

James L. Edmondson, U.S. Circuit Judge, 11th Cir., June 9

Nicholas Tsoucalas, Judge, U.S. Court of International Trade, June 11

Nomination Withdrawn

Jefferson B. Sessions III, U.S. District Judge, S.D. Ala., July 31

Elevations

John F. Grady, Chief Judge, N.D. Ill., July 1

Ralph G. Thompson, Chief Judge, W.D. Okla., July 1

John P. Fullam, Chief Judge, E.D. Pa., July 20

Senior Status

Wendell A. Miles, U.S. District Judge, W.D. Mich., May 9

Robert E. Varner, U.S. District Judge, M.D. Ala., June 12

Luther B. Eubanks, U.S. District Judge, W.D. Okla., June 30

Frank J. McGarr, U.S. District Judge, N.D. Ill., June 30

Deaths

James A. Coolahan, U.S. District Judge, D.N.J., July 16

Alfred L. Luongo, Chief Judge, E.D. Pa., July 19

Edwin D. Steel, Jr., U.S. District Judge, D. Del., July 27

JOHNSON, from page 7

just as vitriolic, just as severe as it was in any desegregation case I ever had.

Would you please comment on the Alabama prison system and the cases that came before you in 1975.

The state of Alabama is not required under the state constitution or the federal Constitution to operate a prison system; no state is so required by law. As a practical matter they are required to operate some kind of penal system; however, if they do, they are required to operate it without violating basic constitutional rights as guaranteed by the Eighth Amendment. A state cannot treat prisoners in a cruel and inhuman manner and the evidence in the *James v. Wallace*, *Pugh v. Locke*, and *Newman v. State of Alabama* prison cases in Alabama, when the cases were heard, reflected that the conditions incident to incarceration in the larger Alabama prisons were clearly violative of the Eighth Amendment to the Constitution, and the defendant's lawyer—the governor's lawyer—after the fourth or fifth day of taking testimony got up in open court and said, "Judge, we acknowledge that the operation of the prisons in Alabama is violative of the Eighth Amendment to the Constitution of the United States." Well, a federal judge cannot if he is going to afford any relief to the parties say, "Well, I'll enter an order finding that you are in violation of the Eighth Amendment to the Constitution." What relief do the prisoners get from that? A judge must, in order to afford some relief, devise some means whereby there is within a reasonable time the elimination of the conditions that give rise to the violations of the constitutional rights. And that's where the problem comes and that's where a judge really gets involved insofar as the state's financial ability to eliminate the violations is concerned. But as it turned out Alabama solved its prison problems. It has implemented all of the minimum standards that I ordered implemented. Those standards were designed to eliminate these Eighth Amendment violations. Alabama has gone further than that and built new prisons that I didn't even envision at the time, and it now has one of the finest state penal systems in the United States.

How long did it take?

It took about 10 or 12 years. But it took 100 years for the conditions to get to the point that they violated the Eighth Amendment; under such circumstances you cannot expect to eliminate those conditions overnight.

"A judge must, in order to afford some relief, devise some means whereby there is within a reasonable time the elimination of the conditions that give rise to the violations of the constitutional rights."

Why did you elect to appoint a committee instead of a special master to monitor the standards you established for the prisons?

I appointed what I called the human rights committee to monitor the implementation of the minimum standards that I determined to be necessary; I entered a very detailed court decree after the constitutional violations were found. I had found that in litigation involving the operation of state institutions such as mental hospitals and prisons detailed mandatory injunctions were necessary.

How did you select the committee? Were they from various disciplines?

Yes, they were. The committee included physicians, attorneys, educators, minorities, law enforcement officers, maintenance experts, sociologists, psychologists, counsel-

See JOHNSON, page 9

OHNSON, from page 8

rs, labor officials, *and*, most impor-ant, homemakers and mothers, vho can detect physical and mental ndignities quicker than most. I let he parties suggest people who vould be appointed—both sides.

Were there newspaper people, vho might be able to explain it in rticles?

Yes, and they did. They shed a lot f light on the situations in the labama prison system and the ental health system. A district dge owes it to himself and the urt upon which he serves to pro-ct the office he holds and he has to eep himself in a position of being le to enforce his decree; the worst ing that can happen to a district dge is to enter a decree and not nforce it. If he ever does that, he's bad shape as far as the enforce-ent of his future decrees is ncerned.

What were the major parts of the arge to the human rights mmittee?

I first gave them the background the cases and explained why I d entered a court order enjoining e state of Alabama officials from ling, within the times prescribed, implement certain minimum ndards designed to eliminate the regious constitutional violations en in existence in the state prison stem. I pointed out that at the nclusion of seven days of trial, unsel for the state defendants ated to the court: "Your Honor, e defendants in this case, the abama Board of Corrections and veral of its officers, rest their case this time. They rest their case sed upon the amended complaints ed and upon the overwhelming jority of the evidence, which ows that an Eighth Amendment olation has and is now occurring inmates in the Alabama Prison stem."

I also explained to the members of e committee that "an Eighth nendment violation confession eans that the state of Alabama in the operation of its prison system throughout the state is operating the system in such a manner as to treat those incarcerated in the Alabama prisons in a cruel and inhuman manner. In spite of some of the public reactions of one or more state officials to this court order, it must be kept in mind that the court order was not only based upon the overwhelming evidence but was based upon over 1,000 stipulated facts, testimony of Alabama Prison Commissioner Sullivan, and the confession of cruel and inhuman conditions as made by the counsel that represented all of the state defendants."

The committee's responsibilities were then spelled out, calling their attention in particular to their responsibility to monitor implementation of the prison standards established by the court and to determine whether conscientious efforts on the part of prison officials were being made to comply with the standards. This part of the charge reads: "You should also take particular notice that you have a further duty and authority to monitor the implementation of the standards set up by this court in *Newman v. Alabama*, a copy [of which] was handed to you [and which] is concerned with the inadequacy of medical treatment provided prison inmates in Alabama's prison system."

The Tenth Amendment to our Constitution, which reserves powers not expressly granted to the federal government for the states, was called to their attention. The charge explains, however, that this amendment "does not relieve the states of a single obligation imposed on them by the Constitution of the United States." I had no hesitancy as a federal judge in saying this, and in adding, "The history of federal litigation, particularly for the last 20 years in this state, is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing.... Consequently, the federal courts time after time have been required to step into the vacuum left by the state's inaction. It must be added that these cases rarely come as a surprise to anyone, because they are generally filed and decided only after the aggrieved parties have exhausted all hope of vindicating their rights through other channels."

I frankly told the membership of this committee that their "job is not going to be an easy one. Several instances will illustrate the pervasive and gross neglect of prisoners' medical needs which prevails within the Alabama prison system."

I then cited specific instances of maltreatment or lack of treatment—

See JOHNSON, page 10

Annuities Program Amended

President Reagan has signed into law H.R. 3570, amending 28 U.S.C. § 376 to reform and improve the federal justices and judges' survivors annuities program (Pub. L. 99-336). The amendments become effective Oct. 1, 1986. For a description of the provisions of the bill, see June *The Third Branch*.

CALENDAR

Sept. 4–7 Second Circuit Judicial Conference
Sept. 10–12 Workshop for Clerks of U.S. District Courts
Sept. 15 Judicial Conference Ad Hoc Committee on Inns of Court
Sept. 18–19 Judicial Conference of the United States
Sept. 21–23 Third Circuit Judicial Conference
Sept. 22–27 Seminar for Newly Appointed U.S. District Court Judges
Sept. 24–26 Workshop for Bankruptcy Chief Deputy Clerks

JOHNSON, from page 9

in some instances, the patient/prisoner had even died as a direct result of inhumane conditions, including unsanitary living conditions, unsanitary food storage and preparation, stench, and dangerously exposed electric wires. A major problem—overcrowding—was especially called to the committee's attention.

The charge concluded with: "The selection of the members of this Human Rights Committee was not at random. You were selected because of your dedication to a humanitarian concept that human beings must not be treated as animals, and in a cruel and inhuman manner, by other human beings. You were selected because of the expertise that you possess in various fields and endeavors, which expertise will enable you to intelligently evaluate, weigh, and monitor the implementation of these court orders. And so I say to you today: proceed with dignity and courtesy in your relationship with the penal officials but proceed with firmness and resoluteness, keeping your eyes on the polestar, i.e., the elimination of the existing inhumane and barbaric conditions in the Alabama penal system."

[The *Newman* and *Pugh* cases were appealed to the Fifth Circuit. The circuit court approved the steps taken by the court "to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for the prisoners" and to generally bring about improved conditions in the Alabama prison system; the court held that the judge's mandates were "justifiably invoked" and within the "sound discretion" of the district court to cure Eighth Amendment violations. The opinion disapproved the Human Rights Committee, however, stating that "a less intrusive, more effective approach would have been to name one monitor for each of the prisons . . . with full authority to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations." *Newman v. State*, 559 F.2d 283, 290 (5th Cir. 1977) (emphasis in original). Judge Johnson's charge to the committee is available from the FJC's Information Services.]

Did you get involved in the split of the Fifth Circuit?

Yes. We first started talking about splitting the circuit back in 1977, and the proposal at that time was to divide into four states and two states—Louisiana and Texas were to be one circuit and Mississippi, Alabama, Georgia, and Florida were to constitute the other circuit. I was a district judge then, but it was apparent to me that such a division was both philosophically and geographically bad. I thought that it might have been, whether I was right or wrong, an effort to divide because of some racial problems and because of some rulings some of the old Fifth Circuit judges were making that maybe some congressmen were not liking. So I opposed it at that time, but when it came on later I was, as a circuit judge, designated by the Fifth Circuit to be a spokesman for the circuit after the judges passed a resolution requesting Congress to split the circuit three/three, and I appeared and testified before the Kastenmeier subcommittee in support of the split. So I was very much involved.

You have established a reputation for being a good manager. Do you have any innovations for management techniques to recommend to new judges coming into the system?

I think a judge must be a good administrator, particularly the chief judge in a district court. He cannot leave court administration up to someone else. A court won't administer itself. Good court administration is critical to the operation of a good court. Chief Justice Burger recognizes this. He's one of the finest court administrators we have ever had, and he insists on good court administration at every level of the federal judicial system. Chief Judge John Godbold of the Eleventh Circuit is a crackerjack court administrator. And it results in the Eleventh Circuit's being one of the best run circuits in the country. You can tell that from the statistics that are regularly distributed by the Administrative Office. One of the basic approaches to being a good court administrator is case management. You manage a case from the day it's filed until it's disposed of. You don't leave it up to court employees to do the case management—except to implement the court policies.

Especially the lawyers?

Well, as a general observation

See JOHNSON, page 1

NOTEWORTHY

Recommendations on prison industries. The recommendations of the National Task Force on Prison Industries have been published by the National Center for Innovation in Corrections (NCIC), located at George Washington University in Washington, D.C. The task force was formed in 1984 and convened under the guidance of Chief Justice Burger and the Brookings Institution in 1985. Its 50 recommendations concern such issues as the role of the public sector, private industry, and labor unions in the prison industries concept; the payment of prevailing wages to inmates for production meeting private sector standards; and possible union membership for inmates.

The foreword to the task force's report, *National Conference on Prison Industries: Discussions and Recommendations*, notes that "a new, enlightened, public-private partnership is the key to restoring prison industries to the wide level of employment it enjoyed a century ago—without the exploitation and inefficiencies."

Copies of the report are available from NCIC, George Washington University, 2130 H St., N.W., Room 621, Washington, DC 20052. ■

OHNSON, from page 10

ey won't. That's the problem that me district courts experience in al-wing the lawyers to bring the case n for trial when they get ready. A od docket clerk will keep the dge to whom a case is assigned prised of the date of the filing, the te that the answer is due, the date at the motion to dismiss is filed, d that case is automatically put on regularly scheduled motion calen-r for submission of those motions. hen the case is ripe for pretrial, it's tomatically put on a pretrial calen-r and doesn't just sit there. I und it absolutely necessary to be a se manager when I was a district dge.

Are there some areas in the fed-al court system you would like to e changed?

What we need to do is to improve ficiency and effectiveness and cut necessary cost in the operation of e courts without affecting the qual-of the work of the court. One ea where money could be saved is the administration of the bank-ptcy court system. Currently, as u know, bankruptcy employees in ch judicial district are under the pervision of a separate bankruptcy rk rather than the clerk of the urt. If the bankruptcy employees re under the supervision of and egrated into the office of the clerk the district court, this would elim-te duplication of equipment, es-cially all the automation equip-nt. In administration, it would minate that duplication. You'd re-ce the need for a substantial num-r of employees, and I would guess t consolidating would result in a vings to the court system in excess a million dollars a year. Unfortu-tely, this may not be possible. In 1923 the Senate has said that re can be no such consolidation thout the approval of the Judicial nference and the Congress. I pe this court administration pro-iption will not become law.

Habeas corpus filings in the fed-l courts continue at a high rate. Do you believe the habeas corpus filings will always be with us?

Yes. The roots of the Great Writ of Habeas Corpus can be traced back further than the Magna Carta, to the twelfth century or earlier. Throughout English history, prior to the birth of this country, the writ was used to free prisoners who had been imprisoned arbitrarily and, therefore, without due process of law. The writ was later incorporated in Article I of the federal Constitution and in many state constitutions. Although some of the states omitted the writ from their constitutions, the most plausible explanation for their omission is that the writ was too fundamental to be questioned.

Today, the writ provides the primary mechanism for the vindication of federal constitutional rights. In the first place, federal courts have more experience than state courts in dealing with federal issues, and therefore are generally more competent to decide issues of federal law. Also, federal judges, unlike most state judges, are given lifetime tenure, which insulates them from local politics and adverse popular opinion. Many elected state judges have proved reluctant to overturn convictions even where the prisoner was clearly denied due process. Overturning a conviction is often an unpopular and misunderstood decision than can cost an elected state judge his job. The availability of the federal habeas writ guarantees that a prisoner can present his constitutional claims to a tribunal that is not subject to the same kind of political pressure.

Certainly the habeas writ entails costs; by providing a forum where prisoners can vindicate meritorious federal claims, federal courts are required to entertain many nonmeritorious or even frivolous claims. But it is a cornerstone of our system of justice that we are willing to pay great costs to avoid condemning innocent persons. In order to ensure that innocent people are not arbitra-

See JOHNSON, page 12

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Aldisert, Ruggero J. "The House of the Law." 19 *Loyola of Los Angeles L. Rev.* 755 (1986).

Alschuler, Albert W. "Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases." 99 *Harvard L. Rev.* 1808 (1986).

"Annual Eighth Circuit Survey." 19 *Creighton L. Rev.* no. 4 (1985–86).

Bennett, Steven. "Summary Disposition of Appeals: Lessons from the D.C. Circuit." 30 *St. Louis University L.J.* 463 (1986).

Breger, Marshall J. "The APA: An Administrative Conference Perspective." 72 *Virginia L. Rev.* 337 (1986).

Funke, Gail S. (ed.). *National Conference on Prison Industries: Discussions and Recommendations.* National Center for Innovation in Corrections, George Washington University, 1986.

Gallant, Kenneth S. "Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers." 38 *Oklahoma L. Rev.* 447 (1985).

Gross, Leonard E. "Judicial Speech: Discipline and the First Amendment." 36 *Syracuse L. Rev.* 1181 (1986).

"In Tribute to John Minor Wisdom." 60 *Tulane L. Rev.* 231 (1985).

Kilgarlin, William W., and Jennifer Bruch. "Disqualification and Recusal of Judges." 17 *St. Mary's L.J.* 599 (1986).

Lay, Donald P. "Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act." 71 *Iowa L. Rev.* 935 (1986).

Marshall, Prentice. "Some Reflections on the Quality of Life of a United States District Judge." 27 *Arizona L. Rev.* 593 (1985).

Mikva, Abner J. "The Changing Role of Judicial Review." 38 *Administrative L. Rev.* 115 (1986).

Weiner, Charles R. "From the Bench: Concentrating on Cooperation." 12 *Litigation* 5 (Winter 1986).

JOHNSON, from page 11

rily condemned, our Constitution guarantees that every defendant has the right to due process of law. This right is equally strong—even where there is overwhelming evidence of guilt. Without the habeas writ, the right to due process would be seriously eroded and, in many cases, empty. If the preservation of the Great Writ requires the expenditure of a large amount of judicial resources, that is a cost that our society traditionally has been, and should always remain, willing to pay. ■

IMPEACHMENT, from page 3

presented the articles of impeachment to the Senate. The Senate Rules Committee is expected to work out the procedural rules to be followed in Judge Claiborne's Senate trial, which is unlikely to begin before mid-September. ■

BANKRUPTCY, from page 1

would cost about half that amount.

Current U.S. trustee proposals would increase assessments against estates to pay the additional costs, a policy decision for Congress, Judge DeMascio noted. "Whatever system the Congress may develop for increasing assessments could as easily be applied against the costs of the Judicial Conference's proposed bankruptcy administrator." Finally, "Bankruptcy cases are filed with and are pending before the courts. It makes no sense to call upon another branch of the government to 'administer' cases pending in the judicial branch. Such a diffusion of basic responsibilities in bankruptcy cases can only lead to confusion as judges attempt to manage their dockets while U.S. trustees are independently administering the underlying estates."

The Conference's proposal for bankruptcy administrators provides for their appointment by the courts of appeals, much as federal defenders are now appointed, thus guaranteeing the independence of the administrators. In a recent survey of all circuit and district judges and all bankruptcy judges, the respondents overwhelmingly favored a program in the judiciary rather than the Department of Justice.

"The courts have certainly never been given the opportunity to demonstrate our ability to operate a similar program, with a full range of powers, and to have that experience compared to the U.S. trustee pilot program by an independent agency such as the GAO," Judge DeMascio said.

On Aug. 17 the Senate made its version of the bill (see June *The Third Branch*) an amendment to the House bill and requested a conference. The Senate version lets courts opt out of the trustee program. ■

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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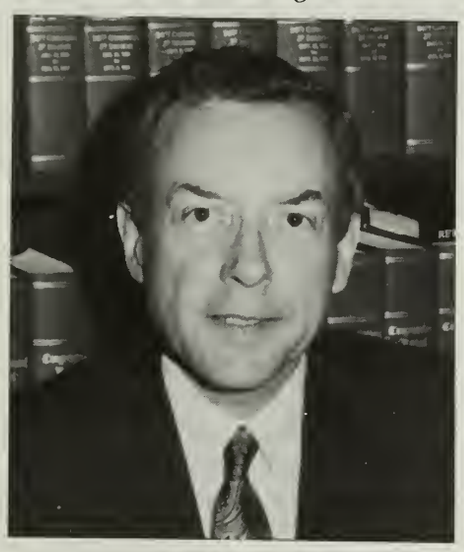
OCTOBER 1986

Senate Judiciary Committee Member Discusses Federal Courts' Role, Specific Legal Issues

Senator Orrin G. Hatch (R-Utah) is he fourth-ranking Republican on the enate Judiciary Committee, and with ie upcoming retirements of Senators lathias and Laxalt will rank second. He as first elected to the U.S. Senate on ov. 2, 1976, and reelected in 1982. enator Hatch is chairman of the Senate ommittee on Labor and Human Re-urces and of the Senate Judiciary Com-ittee's Subcommittee on the Constitu-on. He is a graduate of Brigham Young niversity (B.S.) and the University of ittsburgh (LL.B.) and practiced law in tah and Pennsylvania.

You wrote several years ago that ie matter of attorneys' fees had otten out of hand. Do you plan a gislative initiative on this issue?

Many share the view that fee-ifting litigation has gotten out of and. A recent Supreme Court opin-n noted that litigation over fees "serves no productive purpose, vindicates no one's civil rights, and ex-



Senator Orrin G. Hatch

acerbates the myriad problems of crowded appellate dockets." Much of this litigation arises because the operative language of the fee-shifting statutes simply discusses the award of reasonable fees without any standards or guidance as to what is a reasonable fee. Now my Subcommittee on the Constitution has held several hearings on the Legal Fees Equity Act, which would codify many standards developed by recent Supreme Court cases and also set a generally applicable cap of $75

See HATCH, page 4

Judicial Pay, Marshals Service Bills Pending

The following legislative items are of interest to the judiciary.

- Senator George J. Mitchell (D-Me.) has introduced a bill, S. 2691, to allow federal judges to receive the same pay increases as are granted for all other federal employees. Senators Ernest Hollings (D-S.C.) and Lloyd Bentsen (D-Tex.) are cosponsors of the bill. This bill would serve to correct what Senator Mitchell has characterized as a "hurdle of affirmative congressional action" that only judges and "no other federal employee need face" to obtain pay increases. The "hurdle" is section 140 of Pub. L. 97-92, enacted in 1981, which excludes judges from the Executive Salary Cost-of-Living Adjustment Act provisions applicable to other high-level federal officers. That measure was enacted following what Senator Mitchell

See LEGISLATION, page 7

koler to Head FJC Education & Training Div.

The Board of the Federal Judicial enter has unanimously approved e appointment of Daniel L. Skoler

Daniel L. Skoler

be the director of the Center's Di-sion of Continuing Education and Training. He succeeds Kenneth C. Crawford, who retired in May (see *The Third Branch*, May 1986).

Mr. Skoler brings to the Center extensive experience in judicial education and administration, serving as executive director of the National Council of Juvenile and Family Court Judges from 1962–65, then as assistant director of the American Judicature Society and executive director of the American Bar Association's Commission on Correctional Facilities and Services and its Commission on the Mentally Disabled.

He directed the Department of Justice's block grant program under the Omnibus Crime Control and Safe Streets Act of 1968. More recently, he has served as deputy associate commissioner of the Office of Hearings and Appeals at the Social Security Administration and then as

See SKOLER, page 2

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Judges Asked to Submit Comments on Guidelines

The Sentencing Commission is soliciting written comments on its preliminary draft guidelines, which were to be published in the *Federal Register* in September and sent to each federal circuit and district judge. Critical analysis of the draft and the issues it raises will help the commission as it drafts its final

NEWS FROM THE SENTENCING COMMISSION

guidelines in early 1987. Federal judges and all others interested in the administration of criminal justice are encouraged to study the preliminary draft guidelines and submit their comments to the commission at 1331 Pennsylvania Ave., N.W., Suite 1400, Washington, DC 20004, Attention: Guidelines Comments. Comments should be received by Dec. 3.

As reported in recent issues of *The Third Branch*, the commission will also hold public hearings on the preliminary draft guidelines, starting in Chicago on Oct. 17, to be followed by hearings in New York City on Oct. 21, Atlanta on Oct. 29, Denver on Nov. 5, San Francisco on Nov. 18, and Washington, DC, on Dec. 2–3. The Judicial Conference has authorized the chief judge of each circuit to designate a circuit judge and a district judge to participate in the Sentencing Commission hearing in the city nearest to them. All hearings will begin at 10 a.m. and will be held in each city's ceremonial courtroom in the federal courthouse, except in New York City, where the hearing will be held in Courtroom 318 of the federal courthouse. The public comment period will close at the end of the Washington hearing in December.

* * *

On Sept. 23, 1986, the Sentencing Commission held a hearing in Washington, DC, on the proper role of plea agreements in a sentencing guidelines system. The hearing was the fifth in a series addressing topics of importance in the development of the guidelines.

The guidance the commission gives sentencing judges on plea agreements is especially important because approximately 90 percent of federal criminal cases are presently disposed of by guilty pleas. The legislative history of the Sentencing Reform Act reflects congressional concern that plea agreements should not be used to circumvent the sentencing guidelines. Witnesses at the Sept. 23 hearing addressed the questions of the appropriate limits of judicial scrutiny of negotiated plea agreements and the impact of guidelines on "charge bargaining" under Fed. R. Crim. P. 11(e)(1)(B) and "sentence bargaining" under Fed. R. Crim. P. 11(e)(1)(C). ■

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

ABA Supports Civil RICO Reform, Grand Jury Procedural Protection Bill, Other Proposals

The American Bar Association at its annual meeting this summer approved several resolutions of interest to the federal courts.

- The ABA supported a proposed amendment to "civil RICO" provisions that would change the definition of "pattern of racketeering activity" to require that the alleged acts be shown to be part of a continuing scheme or plan of criminal activity, to increase to five the number of criminal acts that must be alleged in wire and mail fraud cases, and reduce to five years the time period over which the alleged acts must have occurred. The provision would make Fed. R. Civ. P. 65 applicable to RICO with respect to granting injunctive relief and would provide that a party who brings a frivolous or bad faith suit shall be subject to costs and attorneys' fees.
- The ABA endorsed that portion of the King Committee report that encourages law schools to continue improvements in practice-oriented legal education. The ABA urged U.S. district courts, however, not to require trial experience until the Judicial Conference is able to verify empirically that such measures do in fact improve the quality of advocacy.
- The ABA supported pending legislation, H.R. 5367, to provide stronger sanctions for violations of grand jury procedural rules. For example, in *United States v. Mechanik*, 106 S. Ct. 938 (1986), the Supreme Court held that although Fed. R. Crim. P. 6(d) (which provides that only one witness may be present in the grand jury room at any time) had been violated by the joint testimony of two law enforcement agents before the grand jury, it was "harmless error," precluding a re-

See ABA, page 8

SKOLER, from page 1

chairman of the Trademark Trial and Appeal Board in the Department of Commerce.

A 1952 graduate of Harvard Law School and a practitioner with a New York firm for seven years, he has lectured and written extensively on law-related subjects and judicial administration. His book *Organizing the Non-System: Government Structuring of Criminal Justice Systems* was published in 1977. ■

Bonventre, Hodson Chosen to Be Judicial Fellows

Vincent Martin Bonventre and Thomas S. Hodson have been selected as Judicial Fellows for 1986–87.

Vincent Bonventre

Vincent Bonventre is a graduate of Union College and Brooklyn Law School, and holds an M.A. in government from the University of Virginia. He is a Ph.D. candidate at U. Va., writing a dissertation on the free exercise of religion, and has served as an assistant professor of government there. He was criminal trial counsel with the Judge Advocate General's Corps in 1977–80 while holding the rank of captain in the U.S. Army. At the time of his application to the Judicial Fellows program, Mr. Bonventre was law clerk to Judge Matthew J. Jasen of the New York Court of Appeals. He will be assigned to the FJC's Research Division.

Thomas Hodson at the time of his application was a judge of the highest level trial court in Ohio. A graduate of Ohio University and of the Ohio State University College of Law, he was first elected to the bench in 1979. He has experience in print and broadcast journalism, has been a visiting professor at the Scripps School of Journalism at Ohio University, and has taught or participated in numerous programs on judicial education and court/media relations. He will be assigned to the Supreme Court. ■

Thomas Hodson

ustices, Legislators, Panelists Speak at Recent ederal Circuit Judicial Conferences

The Fourth, Eighth, Ninth, and enth Circuit Judicial Conferences ere held recently. Participants addressed a wide range of topics afcting the courts' work.

• Chief Justice Warren E. Burger ldressed the Fourth Circuit conferce in White Sulphur Springs, W. a. Other speakers included law rofessors Irving Younger of the niversity of Minnesota and urens Walker of the University of rginia, who spoke on the relationip between law and the social sices. There were also presentations attorney-client privilege. New dges of the circuit were introced, and a panel of academics rewed major Supreme Court decions of the October 1985 term.

• The Ninth Circuit conference in n Valley, Idaho, had as its theme public's view of how the court nducts its business. Justice Byron White, Attorney General Edwin Meese, III, and Representative Neal Smith (D-Iowa) were among the conference's special guests. Rep. Smith (chairman of the House Appropriations Committee's subcommittee on appropriations for the de-

See CIRCUITS, page 8

State Court Judge Held Not Immune from Suit

A state court judge was not immune from suit under 42 U.S.C. §§ 1981 and 1983 in a case alleging violations of a court employee's civil rights, the Seventh Circuit held recently in *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986).

The case arose when the newly elected judge of an Indiana county superior court took office and dismissed his entire courtroom staff, including McMillan, a court reporter. She sued, alleging that she had been dismissed because she was black and a Democrat. The district court denied the judge's motion to dismiss, and the Seventh Circuit affirmed. "Immunity is only granted when essential to protect the integrity of the judicial process," the circuit court noted, saying that courts must be "hesitant in applying the doctrine [of judicial immunity] to judges acting outside the traditional dispute resolution function." "Hiring and firing of employees is typically an administrative task" rather than one that "implicates the judicial decisionmaking process."

The circuit court distinguished its earlier decision in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), a case that held a judge was immune from suit for firing a probation officer. In *Forrester*, "because the probation officer advised the judge on substantive decisionmaking, the judge's own discretion was sufficiently at risk to fall within the [judicial immunity] doctrine's purpose .... Because court reporters are not similarly situated such analysis is not dispositive" in the *McMillan* case, the court said.

HATCH, from page 1

per hour on fee awards. According to expert witnesses, this will suffice to attract competent attorneys to meritorious suits while avoiding windfalls for attorneys in protracted litigation over fee amounts.

In the *Harvard Law Review*, you recently warned against politicization of the process of approving Supreme Court nominees. Would you comment on the nomination process as you see it at this juncture?

Injecting political considerations into the confirmation process tends to make the judiciary just another political branch of government. If the Senate treats the judiciary like another political branch, it will take on that character in the eyes of the public. The judiciary's nonpolitical role, which has been the basis of its independence and prestige, should not be jeopardized by partisan considerations.

With regard to President Reagan, most presidents who have served two terms have had a greater impact on the judiciary than Reagan, as have several who have served even less time. For instance, Woodrow Wilson served eight years. He appointed 50 percent of the federal judges. Eisenhower served eight years; he appointed 69.9 percent. Roosevelt—thirteen years—appointed 77.3 percent. Nixon served six years and appointed 45.2 percent. Johnson, five years, appointed almost 54 percent. Kennedy—three years—37.4 percent, Carter—four years—39.1 percent, and Reagan—five and a half years—36.2 percent. Should President Reagan finish out his term, by the end of 1988 he could approach 50 percent, which would put him on the order of, say, Woodrow Wilson or even Lyndon Johnson.

In terms of quality, Reagan's judges have also been excellent. Giving three points for each exceptionally well-qualified judge, two points for every well-qualified, and one point for every qualified (according to the ABA ratings), Reagan has a 1.61 rating for all Article III judges, which is slightly ahead of Carter's 1.60 rating. So he's done very well there.

How is the Senate Judiciary Committee responding to the increased emphasis on alternative dispute resolution?

Given the growing chorus of authoritative voices seeking tort reform and the pressures on all court dockets, we must encourage responsible alternatives. In the long run, however, even alternatives like arbitration are only going to work if the courts remain available as the ultimate resolvers of disputes. The judicial branch serves the irreplaceable function of being the final backstop.

Would codify fee standards.

In June, the Senate Judiciary Committee approved legislation to create an intercircuit tribunal, but with modifications. Chief Justice Burger has said he cannot support the bill in its present form. Is there a version of the bill you favor?

The Chief Justice withdrew his support from the bill after the DeConcini amendment was adopted on a nine-to-eight vote. Senator DeConcini's amendment expanded the panel to thirteen members, who were to be chosen by their respective circuits, rather than nine members chosen by the Supreme Court. I voted against this amendment. In my opinion, the panel is only likely to reduce the Court's burden if it has the Court's trust. If the panel is not reflective of the Supreme Court itself, the Court will be reluctant to refer many cases and will feel compelled to give detailed review to the panel's product. Thus, a panel that does not have the Court's full trust could actually increase the Court's caseload. Since this was to be merely a temporary experiment, it made sense to let the Court try a system with which it would be most comfortable.

Do you favor the creation of special courts—for example, an Article I court to handle Social Security cases?

We hear often about a proposed Social Security court, because there are approximately 1.3 million complaints filed every year under this program. Moreover, I have heard estimates that a significant percentage—as much as 15 to 20 percent of our federal court caseload—is derived from Social Security cases. The House subcommittee considered the idea of a special court in 1982 but the bill died in subcommittee. It failed, as I understand it, because it was an expensive proposal whose ability to reduce the federal court caseload was severely questioned. Our American system of justice has avoided the specialized court systems customary in Europe for good reasons. Courts attuned to narrow issues become little more than bureaucrats administering a special program for a target constituency. We expect our judges to resolve disputes according to broader and more equitable constitutional and legal principles.

As chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, give us your thoughts on the likelihood of any constitutional amendments in the foreseeable future.

See HATCH, page 5

HATCH, from page 4

Well, first the balanced budget amendment that passed the Senate in 1982: It failed by one vote in 1986. Unbalanced budgets for 27 of the last 28 years demonstrates the need for constitutional reform. History indicates that the Nation's founders considered a balanced budget an unwritten constitutional principle.

Another possible constitutional amendment concerns school prayer: There are few areas of constitutional adjudication which are more confused. For instance, the wall-of-separation doctrine has fostered a climate of government hostility toward our traditional heritage of religious faith, and there is a need to restore the correct vision of the First Amendment.

I think there are a lot of other possible subjects as well. For instance, the issue of abortion: I believe that a constitutional amendment may be the only way to give legislative bodies and the people a role in resolving the issue of abortion. The Equal Rights Amendment is another subject. Some feel that this proposal should have been the Twenty-seventh Amendment, but others feel that it would have judicialized and nationalized vast areas of decision making now handled by state, local, and federal legislative and executive governments. There are whole volumes written on that issue. We held over twelve hearings on the ERA and were startled to find out what the ERA really would mean in institutional terms.

Electoral college reform is still mentioned on occasion. There are those who want direct election of the president. On the other hand, the electoral college does prevent a single populous region from capturing the presidency.

These, I would say, are the best long shots for a new amendment to the Constitution. Who knows? There may be others.

Do you favor a "balanced budget" institutional amendment?

Yes. Every state save one has such a requirement, and they have worked very well to control deficit spending. Deficits are linked to high taxation, inflation, and unemployment, factors which gradually erode our national strength and freedoms.

You favored several years ago a bill to withdraw the jurisdiction of lower federal courts to issue any order "requiring the assignment of students to schools on the basis of race or which has the effect of excluding any student from any public school on the basis of race." Do you still favor such legislation?

The bill to which you refer, S. 37, is currently pending on the Judiciary Committee calendar after receiving four-to-one approval in the Subcommittee on the Constitution. S. 37, the Public School Civil Rights Act, does not deprive any court of authority to hear and decide cases. It merely employs Article III and section five of the Fourteenth Amendment to withdraw the discriminatory remedy of forced busing from the quiver of remedies to be deployed in discrimination suits. This is in no way novel. The Norris–LaGuardia Act withdrew injunctions as a remedy in certain labor disputes; the Tax Injunction Act and the Johnson Act also withdrew certain remedies with regard to state taxation and regulatory policies. These and numerous similar laws have consistently been upheld as constitutional.

On a related issue, I recently voted against an amendment to deny the Supreme Court any appellate jurisdiction over school-prayer cases. For many reasons, I felt that it was not prudent for Congress to circumscribe the Supreme Court's appellate jurisdiction in this manner.

In your opinion, should the federal courts have their diversity jurisdiction removed as a means for coping with the caseloads?

I think most trial lawyers—those who really have tried cases through the years—would be very loath to see federal diversity jurisdiction taken away from the federal courts. There is a lot of justice which has

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PERSONNEL

Nominations

Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Aug. 11

James L. Graham, U.S. District Judge, S.D. Ohio, Aug. 15

Frederic N. Smalkin, U.S. District Judge, D. Md., Aug. 15

James R. Spencer, U.S. District Judge, E.D. Va., Sept. 9

Appointments

William H. Rehnquist, Chief Justice of the United States, Sept. 26

Antonin Scalia, Associate Justice, Supreme Court of the United States, Sept. 26

D. Lowell Jensen, U.S. District Judge, N.D. Cal., June 27

Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., June 29

Patricia C. Fawsett, U.S. District Judge, M.D. Fla., June 30

Alan E. Norris, U.S. Circuit Judge, 6th Cir., July 1

David Hittner, U.S. District Judge, S.D. Tex., July 1

John E. Conway, U.S. District Judge, D.N.M., July 3

William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., July 10

Karen L. Henderson, U.S. District Judge, D.S.C., July 11

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, July 14

Edwin M. Kosik, U.S. District Judge, M.D. Pa., July 15

Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., July 15

John G. Davies, U.S. District Judge, C.D. Cal., July 18

Douglas P. Woodlock, U.S. District Judge, D. Mass., July 21

William D. Stiehl, U.S. District Judge, S.D. Ill., Aug. 1

Elevations

Paul H. Roney, Chief Judge, 11th Cir., Sept. 3

Solomon Blatt, Jr., Chief Judge, D.S.C., Aug. 18

William J. Bauer, Chief Judge, 7th Cir., Sept. 29

HATCH, from page 5

occurred as a result of that ability to go to the federal courts rather than the state courts in true diversity cases. I, for one, would not want to see diversity jurisdiction removed.

Are there changes you would like to see in the Freedom of Information Act?

Last Congress, the Senate passed my Freedom of Information Act Reform Act unanimously. This bill was drafted to offer more protection to confidential law enforcement informants and investigations. No fewer than five detailed studies have documented that FOIA could be "used by organized crime to evade prosecution and retaliate against informants." Those are the words of the Violent Crime Task Force. In addition, the bill offers some procedural protections for business trade secrets and personal privacy of individuals about whom the federal government keeps extensive files. The FOIA is another statute which would not generate as much litigation if its broad language were clarified—as my bill intends to accomplish.

The new extradition treaty between the U.S. and Great Britain would take away the authority of U.S. judges to refuse extradition of persons accused of violent crimes, but the Senate has not yet ratified the treaty. [On July 17, 1986, the Senate ratified the treaty.] What is your view on this issue?

In my view, we need to retain within our law on extradition some flexibility for judges to review the merits of the individual case. For this reason I have had sincere reservations about this treaty. We have held extensive exploratory hearings before my Subcommittee on the Constitution in which we looked at the potential constitutional and legal issues involved in ratifying a treaty of this character. Furthermore, I am concerned about the Diplock Courts and a variety of other matters that seem to be part of the problem with regard to this treaty. So I am not a rubber stamp for the support of this treaty, although I really do feel we have to do everything we can to fight against terrorism in our society today.

As a high-ranking member of the judiciary committee, is there any one issue related to the federal courts that you would place on your high priority list to change?

Well, I think there is a whole raft of areas where we have a particular interest. For instance, I think something has to be done with regard to section 1983 cases and the whole area of state and municipal liability. We are finding now that municipalities across this country cannot get insurance to protect the public servants who serve them. Moreover, even judges have been subject to these suits recently. My bill to strengthen this aspect of judicial immunity was recently approved by my subcommittee, five to zero. And I think we've got to solve that problem within the near future. [See related story, p. 3.]

We also need to solve the problems of malpractice, legal, medical, and otherwise—the whole area of product liability and tort reform as well. If we don't look into all of these areas and resolve them, we're going to find it very difficult for our society to bear the burden of mounting litigiousness.

I also think in the area of civil rights we have got to resolve the question whether or not we have to use an intent test or an effects or results test to identify discrimination. If we just use a disparate impact test or a statistical analysis test, then it seems to me that we will be unlocking a Pandora's box of litigation in this country like never before, and, I think, to the detriment of almost everybody in the country, including minorities. I do believe that the intent test allows circumstantial evidence. It allows all kinds of direct and indirect proof. That is not all that difficult to prove in true cases of discrimination, but there are those who want to be able to make a case of discrimination merely on the basis of statistics when in fact no actual discrimination existed. The whole area of civil rights is very important to me, because I am a great believer in it, but I think we have got to resolve the conflict between those two standards of proof. And I can accept either resolution, but it is no secret that I would prefer to have an intent test in the law in order to say, "this is a person who discriminates." ■

CALENDAR

Oct. 8–10 Seminar for Bankruptcy Judges

Oct. 8–10 Workshop for New Training Coordinators

Oct. 14–16 First Circuit Judicial Conference

Oct. 22–24 Eastern Regional Seminar for Federal Public and Community Defenders

Oct. 27–29 Workshop for Judges of the Eleventh Circuit

Oct. 29–Nov. 1 Seminar for Federal Defender Investigators

Oct. 30–31 Workshop for Appellate Judges

Positions Available

Staff Counsel, Legal Office, U.S. Supreme Court. Legal work for the justices. Salary from $37,599. Must be attorney with minimum of three years' practice, preferably including federal and constitutional law and appellate experience. Send Form 171, references, and a brief writing sample by Oct. 24 to Elizabeth Saxon, Personnel Officer, Supreme Court of the U.S., Room 3, Washington, DC 20543 (202/479-3404).

* * *

Clerk, U.S. Bankruptcy Court, D. Utah. Salary from $44,430 to $57,759. To apply, send resume by Oct. 20 to Chief Judge Glen E. Clark, U.S. Bankruptcy Court, 350 S. Main, Room 361, Salt Lake City, UT 84101.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 1

termed a "misreading" of the Supreme Court's opinion in *United States v. Will*, 449 U.S. 200 (1980), in which the Court, on constitutional grounds, awarded judges two out of four contested salary adjustments.

Judge Frank M. Coffin (1st Cir.), as chairman of the Judicial Conference's Committee on the Judicial Branch, last year sent a letter, together with new evidence of legislative intent, requesting another ruling from the comptroller general concerning the permanency of section 140. In response, in February 1986, the comptroller general ruled for the fourth time that section 140 is permanent law. Judge Coffin stated that he was "disappointed in the comptroller general's ruling, particularly in light of the new material submitted, but I am pleased with the legislation introduced by Senator Mitchell as well as the interest being taken by other senators to remove this inequity." Although the comptroller general ruled that section 140 is permanent, he simultaneously urged its repeal, stating that it is doubtful Congress intended the effect achieved. Senator Mitchell's bill is based on the repealing language recommended by the comptroller general.

• The Senate Judiciary Committee's Subcommittee on Security and Terrorism held a hearing Aug. 13 on legislation sponsored by the Justice Department concerning the U.S. Marshals Service (S. 2044, H.R. 3270, H.R. 4001). S. 2044 would establish the Marshals Service as a bureau within the Department of Justice. Stanley Morris, director of the Marshals Service, testified in support of S. 2044.

Judges William S. Sessions (W.D. Tex.), chairman of the Subcommittee on Judicial Improvements of the Judicial Conference's Committee on Court Administration, Sam C. Pointer, Jr. (N.D. Ala.), and Dudley H. Bowen, Jr. (S.D. Ga.) also testified at the hearing. Judge Sessions told the Senate subcommittee that many judges find S. 2044's modifications of the authority that is currently contained in 28 U.S.C. § 569 "unsettling." Judge Sessions provided the Senate subcommittee with a proposed amendment to S. 2044, recommended by the Judicial Conference's Court Administration Committee, which will preserve individual judges' authority to compel the presence of deputy U.S. marshals during district court proceedings. Mr. Morris stated that he agreed with the Court Administration Committee's proposed version of language to replace the existing section 569. Copies of prepared statements presented by Judges Sessions and Bowen and by Mr. Morris are available from the Legislative Affairs Office of the AO.

• The House Judiciary Committee's Subcommittee on Criminal Justice will hold hearings on proposed amendments to the Criminal Fine Enforcement Act of 1984 (H.R. 3682). The bill would provide for the collection of magistrate-imposed fines by clerks of court, a proposal opposed by the Judicial Conference. Judge Gerald B. Tjoflat (11th Cir.) will present the views of the Judicial Conference before the House subcommittee. It is the Conference's policy that it is inappropriate for the judiciary to collect criminal fines, except in limited circumstances when it is in the public interest for the courts to perform this executive branch function.

• The House Judiciary Committee's Subcommittee on Criminal Justice has concluded hearings on several bills related to the Racketeer Influenced and Corrupt Organizations Act (RICO) (H.R. 2517, H.R. 5290, H.R. 2943, H.R. 3985, and H.R. 4892). The subcommittee adopted a "clean bill," subsequently introduced as H.R. 5445, which would retain a private civil damage remedy for actual damages plus costs, including reasonable attorney fees. The treble-damage award provided by the existing act would be retained in suits brought by the attorney general or by state attorneys general. H.R. 5445 fixes a two-year statute of limitations; establishes derivative liability of parent organizations for illicit activity of their employees and agents, if the parent organization knew of and derived benefit from the illicit activity; and requires the plaintiff to establish fraud by clear and convincing evidence. H.R. 5445 would also change the statute's name to the Pattern of Illicit Activity Act.

• Representative Carlos J. Moorhead (R-Cal.) introduced a bill to establish a Federal Courts Study Commission (H.R. 5467). The bill is identical to one previously introduced in the Senate by Senators Strom Thurmond (R-S.C.) and Howell Heflin (D-Ala.). ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Administrative Office of the U.S. Courts, *1986 Annual Report of the Director.*

✓ Brennan, William J., Jr. "The Fourteenth Amendment." Address to Section on Individual Rights and Responsibilities of the ABA, Aug. 8, 1986.

Burger, Warren E. "The High Cost of Prison Tuition." 40 *University of Miami L. Rev.* 903 (1986).

✓ Burger, Warren E. Remarks to the ABA, Aug. 11, 1986.

Hug, Procter, Jr., National Judicial College Jackson Lecture, Aug. 8, 1986.

Kaufman, Irving R. "Focusing Legislative Attention on the Administrative Needs of the Courts." Institute of Judicial Administration, Aug. 9, 1986.

✓ Powell, Lewis F., Jr. Remarks to American Bar Association Litigation Section meeting, Aug. 12, 1986.

Stevens, John Paul. "The Supreme Court of the United States: Reflections After a Summer Recess." 27 *South Texas L. Rev.* 447 (1986).

CIRCUITS, from page 3

partments of Commerce, State, Justice, and the Judiciary) discussed the fiscal implications for the judiciary of Gramm–Rudman–Hollings, and Chief Judge James R. Browning gave the state of the circuit address. A panel considered "The Judiciary and Society: Responsibility On and Off the Bench"; another group discussed "The High Profile Cases as Seen by the Judge, the Lawyer, and the Media," giving their views about whether it is possible to protect all constitutional rights and maintain judicial and journalistic independence. Members of the conference from each of the districts held separate meetings to discuss the state of the administration of justice in their district.

• Speakers at the Tenth Circuit conference in Denver were Justice Byron R. White, circuit justice for that circuit, Chief Judge Ruggero J. Aldisert (3rd Cir.), A. Leo Levin, director of the FJC, and L. Ralph Mecham, director of the AO. The program included talks and panel discussions on topics such as moral vision and the reconciliation of professionalism, special admission to practice in the federal courts, and the First Amendment.

• The list of speakers at the Eighth Circuit conference in Minneapolis was led by Justice Harry A. Blackmun, circuit justice for that circuit. Chief Judge Donald P. Lay reported on the work of the U.S. Judicial Conference, and FBI Director William H. Webster (a former judge on the Eighth Circuit) spoke on national security concerns in relation to the First Amendment. Judge William W. Wilkins, Jr. (4th Cir.), chairman of the U.S. Sentencing Commission, reported on progress made in drafting sentencing guidelines and answered questions. Law professors Daniel J. Meador of the University of Virginia and John E. Sexton of New York University debated the question whether an intercircuit panel should be established. ■

ABA, from page 2

versal of the conviction on appeal. H.R. 5367 would provide for dismissal of an indictment under such circumstances.

• The ABA endorsed a proposed change in the time period between when an offer of judgment under Fed. R. Civ. P. 68 is made and when it must be accepted or rejected. Presently the rule states that an offer may be made "[a]t any time more than 10 days before the trial begins." The ABA proposal would change the language concerning the timing of the offer so that the offer could be made "at any time more than 60 days after service of the summons and complaints . . . but not less than 60 days before trial." Now, both plaintiffs and defendants allegedly have difficulty concluding settlement negotiations between the time of the offer of judgment and the scheduled trial date (especially where insurance is involved). Sanctions under the rule would also be increased. The "trigger criterion" for imposition of sanctions would remain the same (automatic if the offeree obtains at trial a result less favorable than the rejected settlement offer), but the court would not impose sanctions on its own motion, only upon the offeror's.

For further information on these matters contact Alice O'Donnell, 1520 H. St., N.W., Washington, DC 20005, or FTS 633-6359. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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ustices Discuss Constitution, Affirmative Action, Death Penalty, Bicentennial Celebration Plans at Circuit Judicial Conferences

Justices of the Supreme Court ave spoken at circuit judicial con-rences held in recent months. Re-rinted below are excerpts from the marks of several of the justices ade at recent circuit conferences r which texts were available.

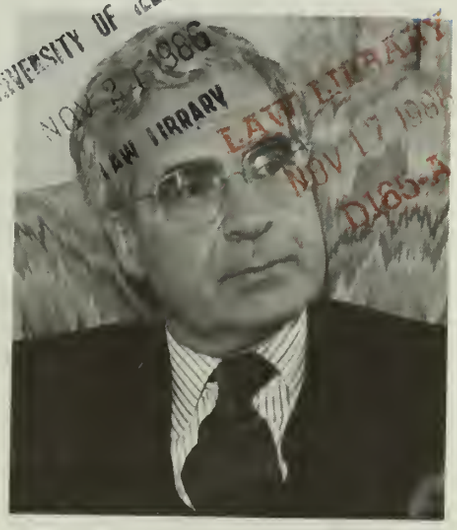
Justice Byron R. White at the inth Circuit Judicial Conference, ug. 22, 1986, Sun Valley, Idaho

The Constitution doesn't require a upreme Court justice to be a law-r. All of them have been—of one nd or another. Nor does it require at a justice have any prior judicial perience. And I hope that presi-nts will not abandon the notion that from time to time a lawyer should be appointed from the bar who has no judicial experience. Such lawyers are closer to the public, they are closer to reality, and they bring a very different point of view and attitude to the Court than a circuit court judge does. I don't mean to insult circuit or district court judges, but they are just different. Judges tend, when they have been on the bench for a while, to become set in their ways; they may think they are more flexible than they used to be, but I doubt it. That goes for me, too. It was a wonderful thing to put Lewis Powell on the Court, and I hope that presidents don't forget to appoint some justices straight from the practice. It will make the Court more responsive, for the Court must remember that its decisions aren't going to last if they won't stand the test of time....

See JUSTICES, page 2

rthur Miller Describes Federal Rules Revision rocess, Changes in Law School Environment

Arthur R. Miller is a professor of law Harvard Law School, where he gradud magna cum laude. He received his A. from the University of Rochester d, following law school, practiced in w York, then taught at the universis of Minnesota and Michigan before ing the faculty at Harvard. Professor ller is the coauthor with Charles Alan ight of Federal Practice and Proce-re *and the author of numerous other -related books and articles. He was reporter to the Advisory Committee Civil Rules of the Judicial Conference he United States and a member of a ial advisory group to the Chief Jus-on federal civil litigation. He is the t of a syndicated television show ed "Miller's Court," a legal expert "Good Morning, America," and has ured at FJC seminars for newly ap-ted district judges.*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Professor Arthur R. Miller

(ou have been a lecturer at the nter for many years now, speak-on such matters as federal rules, ss actions, and jury trials. Based this and your involvement in the ninars for newly appointed dis-t judges, what are your reactions to the federal judiciary today?

It is always a special treat to be part of the faculty at the seminars for newly appointed judges. They seem to me to be eager and anxious to develop their judging tools to the finest. I have especially been impressed in the recent sessions with the intensity of their involvement and the tremendous range of experi-

See MILLER, page 8

Judicial Conference Requests Judgeships, Approves '88 Budget

The Judicial Conference of the United States asked the Congress to authorize 56 additional district court judgeships and 13 additional judgeships on the courts of appeals.

The Conference also resolved at its semiannual meeting in September that Congress should ensure that funds are always available to fulfill the constitutionally created right to a jury trial. (Civil jury trials were temporarily suspended for five weeks last July due to a threatened exhaustion of juror funds.) In other actions, the Conference:

- Approved a fiscal year 1988 budget of $1.3 billion, an increase of 14 percent above the amount recently approved by the Senate's Committee on Appropriations for fiscal year 1987. The Conference also agreed to certain cost reduction measures in response to the Gramm–Rudman–Hollings Act, including staffing limitations and restrictions upon expenditures for travel by judges and judicial branch employees.
- Approved a resolution recording their "esteem, respect, and affection for the Honorable Warren E. Burger and their appreciation of his contribution to the administration of Justice and to the Nation."

See CONFERENCE, page 12

JUSTICES, from page 1

The Framers of the Constitution opted for a limited government. That is, they thought there ought to be some ground rules for those who want to govern, rules that would be enforceable.... The Framers opted for dividing up political power. They kept the states as independent entities. They divided the federal government into distinct parts. And then they imposed very important ground rules. The courts, they anticipated, would enforce these rules, as well as this division of powers. This gave the judiciary an authority that was new to the world at that time, an authority that gives the judiciary a role in how the government is to be run. One of the problems with this is that some of the provisions of the Constitution are obviously minority-oriented and to enforce them you must disagree with the majority....

If this decision is to have a Constitution and ground rules that limit the majority, it is inherent in that system that judges must decide high-profile cases that stir up terrific storms. But that has been our choice. Judges would have plenty to do if they did nothing but find the historical facts and had a perfectly plain rule of law to guide their decision. But we, the judges in our country, must make a great deal of law in deciding cases. Congress can't write laws that are perfectly clear, and many times Congress can't arrive at precise decisions and must go up one level of generality, creating an ambiguity that ends up on the judge's desk. Or Congress deliberately uses general language and leaves it to the courts or the administrative agencies to provide the specifics. Most of the antitrust law, for example, you find in the case books. You can't find out what the Sherman Act means by reading it. Nor can you find out what an unfair labor practice is by perusing the statute. You must go to the decisions of the administrative agency and the courts. Similarly, most of the constitutional law is not to be found by reading the Constitution, which is a very short document. To find the constitutional law you must read the cases. This is judge-made law, a function that judges are performing every single day, and unavoidably so.

"You can't find out what the Sherman Act means by reading it. Nor can you know what an unfair labor practice is by perusing the statute. ... Similarly, most of the constitutional law is not to be found by reading the Constitution, which is a very short document."

—Justice Byron R. White

Justice Thurgood Marshall at the Second Circuit Judicial Conference, Sept. 5, 1986, Bolton Landing, New York

I believe all of the participants in the current debate about affirmative action agree that the ultimate goal is the creation of a "colorblind" society. From this common premise, however, two very different conclusions have apparently been drawn: the first is that "race-conscious" remedies may not be used to eliminate the effects of such discrimination against Negroes and other minority groups in American society. This conclusion has been expanded into the proposition that courts and parties entering into consent decrees are limited to remedies which provide relief to identified individual victims of discrimination. But the second conclusion which may be drawn from our common preference for a colorblind society is that the vestiges of racial bias in America are so pernicious, and so difficult to remove, that we must take advantage of all the remedial measures at our disposal.

The difference between these views may be accounted for, in part, by a difference of opinion as to how close we presently are to the "colorblind" society to which we aspire. I believe that, given the position from which America began, we still have a very long way to go....

Obviously, I too believe in the colorblind society, but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly.... The argument against affirmative action is an argument in favor of leaving that cost to lie where it falls. Our fundamental sense of fairness, particularly as it is embodied in the guarantee of equal protection of the law, requires us to make an effort to see that those costs are shared equitably while we continue to work for the eradication of the consequences of discrimination....

"I ... believe in the colorblind society, but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly."

—Justice Thurgood Marshall

The problem of discrimination and prejudice in America is too deep rooted and too widespread to be solved only in the courts, or only through the intervention of federal authority to convince the recalcitrant that justice cannot be indefinitely delayed.

See JUSTICES, page

THE THIRD BRANCH

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

Advisory Committee of Judges Completes Report Appraising Performance, Structure of Administrative Office of U.S. Courts

The Ad Hoc Advisory Committee on the Administrative Office of the U.S. Courts has submitted its final report. The committee was appointed by Chief Justice Burger in December 1985 to advise AO Director L. Ralph Mecham in his examination of the AO's effectiveness in serving the needs of the federal judiciary and court personnel. Members of the committee were Judge Edward J. Devitt (chairman) and Chief Judges James Lawrence King, Robert J. McNichols, and Jack B. Weinstein.

The committee first sought the views of the judges by mail and received responses from 185 Article III judges. Bankruptcy judges, magistrates, district and circuit executives, clerks of court, public defenders, and probation officers also responded, and 18 members of senior staff at the AO were interviewed.

The most frequent criticism was the perception by some judges and others of the absence of a cooperative attitude and helpful disposition by some AO employees in responding to requests for assistance. The committee noted, however, that Director Mecham and his associates are taking steps to make the AO more responsive to the needs of the courts and judges, with special emphasis being placed upon employee attitudes. Director Mecham has informed the committee that he has advised his staff to adopt a rebuttable presumption that whatever is asked for should be given, and to stress his "five P's": be Prompt, Polite, Professional, Positive, and Proud of your work.

The report notes that some criticism of the AO may arise from the differing expectations that individual judges, the Judicial Conference, Congress, and other agencies have for the AO. In implementing policies determined by the Judicial Conference and by Congress, "the AO, at times, finds itself caught in the middle—between the Conference and the Congress on the one hand, and the judges and others in the Judicial Branch who may fail to appreciate those requirements, on the other," the report noted.

Among the areas dealt with in the report are the increase in size of the AO and its relations with other agencies. The committee noted that the AO is operating with only 538 of its 583 authorized positions, making its size less than the 94 percent of authorized staffing level applied to the courts by a policy of the Judicial Conference. Moreover, the AO's growth has been less than that of the judiciary in general, and its

See AO, page 12

Nominations Being Accepted for Devitt Distinguished Service to Justice Award

Nominations for the fifth annual Edward J. Devitt Award for Distinguished Service to Justice are open until Dec. 31, 1986. The members of this year's selection committee are Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Devitt (chairman). The award is given to an Article III federal judge each year by West Publishing Company to recognize accomplishments and professional activities that have contributed to the cause of justice. It is named for Edward J. Devitt, senior judge of the U.S. District Court for the District of Minnesota, who served as chief judge of that court for more than 20 years. Past recipients of the award include Judge Albert B. Maris (3rd Cir.), Judge Walter E. Hoffman (E.D. Va.), Judge Frank M. Johnson, Jr. (11th Cir.), and Judge William J. Campbell (N.D. Ill.). Chief Justice Warren E. Burger was honored by a special award in 1983, and a special posthumous award was made in 1985 in memory of Judge Edward A. Tamm (D.C. Cir.).

Nominations for the 1986 award should be submitted to Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164–0526. ■

1987–88 Judicial Fellows Program Announced

Young professionals interested in judicial administration are invited to apply for the 1987–88 Judicial Fellows Program.

Now entering its fourteenth year, and patterned after the White House and Congressional Fellowships, the Judicial Fellows Program offers unique opportunities for highly talented professionals with multidisciplinary backgrounds to work in the federal system.

Fellows will be chosen by a national commission to work at the Supreme Court in the office of the Administrative Assistant to the Chief Justice, the Federal Judicial Center, or the Administrative Office of the U.S. Courts.

Candidates should have at least one postgraduate degree, at least two years' professional experience, and preferably some familiarity with the federal judicial system. Stipends for the fellowship are based on salary history and comparable government salaries. The 1987–88 fellowships will begin in September 1987 and last one year. To ensure consideration, applications should be received by Dec. 12, 1986; selections will be made in January 1987.

An application form, information, and literature on the program are available on request from Charles W. Nihan, Executive Director of the Judicial Fellows Commission, Federal Judicial Center, 1520 H Street, N.W., Washington, DC 20005.

Bicentennial Roundup: Speakers, Law School Essay Contest Planned

The following items of interest have been announced by the Commission on the Bicentennial of the U.S. Constitution and other parties planning for the observance of the bicentennial.

• Chief Justice Warren E. Burger, chairman of the Commission on the Bicentennial of the Constitution, has submitted the commission's first full year's report, entitled *Preparation for a Commemoration*. The report discusses programs and projects initiated during the commission's first full year as well as its future plans.

• Judge Arlin M. Adams (3rd Cir.), as chairman of the Bicentennial Judicial Speakers Committee, has corresponded with all federal judges and full-time federal magistrates concerning their possible participation as speakers at events connected with the observance of the bicentennial. The judges and magistrates are being asked to indicate whether they would be willing to participate in the speakers program, and to indicate the kinds of bicentennial themes in which they are interested. The Bicentennial Commission and the FJC will be able to assist participating judges by providing resource material. (Two bibliographies on the Constitution's writing and ratification have already been prepared by and are available from the FJC). Judges wishing to participate or comment on the speakers program should write to Judge Arlin M. Adams, Federal Judicial Center, Attention: Office of the Director, 1520 H St., N.W., Washington, DC 20005.

• West Publishing Company, in cooperation with the commission, has announced its sponsorship of an essay competition for law school students. The first prize will be $10,000, second prize $2,500, and third prize $1,000. The competition is open to all students enrolled in a J.D. or LL.B. degree program in an ABA- or state-approved law school. The subject for the essay is, "Does the allocation of power between the federal and state governments and among

See BICENTENNIAL, page 12

Senate Removes Judge Claiborne from Office

Chief Judge Harry E. Claiborne (D. Nev.) was convicted by the Senate on Oct. 9 on three of the four articles of impeachment voted by the House and ordered removed from office. The Senate did not vote to convict on the article that said the judge's felony conviction on tax-evasion charges was, in and of itself, sufficient basis to impeach him.

On June 18, 1986, the Ninth Circuit Judicial Council certified to the Judicial Conference of the United States that Judge Claiborne had "engaged in conduct which might constitute grounds for impeachment," and the Judicial Conference on June 30 certified to the Speaker of the House of Representatives that consideration of the judge's impeachment "may be warranted." The House of Representatives agreed to the four articles of impeachment on July 22. ■

State Justice Institute Holds First Board Meeting

Nine of the eleven members of the State Justice Institute board took their oaths of office at the U.S. Supreme Court Sept. 29. Chief Justice Warren E. Burger, who did much to promote the establishment of this organization through public addresses and endorsements sent to Congress, administered the oaths. Pictured above with Chief Justice Burger are the board members (l. to r.): Chief Judge John F. Daffron, Jr. (12th Judicial Circuit, Chesterfield County, Va.), Lawrence H. Cooke (former chief judge of the New York Court of Appeals), Chief Justice Warren E. Burger, Larry P. Polansky (Executive Officer, District of Columbia Courts), Sandra Ann O'Connor (state's attorney for Baltimore County, Md.), Justice James Duke Cameron (Supreme Court of Ariz.), Presiding Judge Janice L. Gradwohl (County Court, Third Judicial District, Lincoln, Neb.), Resident Judge Rodney A. Peeples (Second Judicial Circuit, Barnwell, S.C.), Chief Justice Clement C. Torbert, Jr. (Supreme Court of Ala.), Prof. Daniel J. Meador (University of Virginia Law School).

Organizational plans were made at a board meeting following the Sept. 29 ceremonies. Chief Justice Torbert was elected chairman of the board and Judge Peeples vice-chairman. With an initial budget of $7.2 million for fiscal year 1987, the Institute is now operational. Two more board nominations are to be made by President Reagan.

MILLER, from page 1

nces they bring to the federal ench.

What were your contributions to etting out the *Manual on Multidis-rict Litigation*? Did you enjoy that ork?

I think working on the manual as not only one of the most enjoy-ble jobs but actually transformed y life. I go way back to before here was a manual, when a group f judges put together a draft. It was fter the *Electrical Supply Cases* and hen Judge Alfred Murrah was di-ector of the Federal Judicial Center. e sent around a draft with a letter a group of academics, and I was en teaching at the University of innesota. It must go back over 20 ears. I started reading this draft nd I got so intrigued by it that I

"I think in some limited contexts some of the local rules are a bit pushy; they butt up against the national rules."

ote Judge Murrah. And he must ve been intrigued by my answer, cause he then appointed me to a mmittee that worked almost as a ison between the American Bar sociation and the federal judges. I ed to shuttle between the lawyer oup, who were very apprehensive out the manual, and the judge oup, particularly Judge William cker (W.D. Mo.). I would shuttle k and forth and try to negotiate lawyers' views and the judges' ws. That ultimately produced the t manual; then I just sort of hung und over the years to help in the isions.

udge Becker is a wonderful man. taught me more about what fed-l judges really do with their cases n almost anyone I know.

low many revisions were there?

think we went through four or ssibly five revisions of the first tion. And now Judge Pointer of abama has led the team to pro-ce the second edition, which I st confess I have not been as ac-on as I was with the first edition. I think Judge Pointer is one of the paragons of the federal judiciary.

You have been a reporter for the Judicial Conference Advisory Committee on Federal Rules of Civil Procedure for several years. Would you comment on your input to the work of this committee? Do you really feel the public hearings are helpful? Do members of the Advisory Committee, the Supreme Court, and finally the Congress pay that much heed to comment received at the public hearings?

Being the reporter means that, in a sense, I am the "worker bee" of the group. It is my job to execute the wishes of the committee and to do the drafting both of the rules and the notes and the background memoranda. The reporter also affects the agenda of the committee. I had the wonderful experience of working with Judge Walter Mansfield of the Second Circuit, who is a terrific chairman and who has the respect of the entire Advisory Committee.

The public hearings are really a mixed bag. Sometimes they provide very valuable insights, insights as to whether a given rule is effectively drafted, or has caused confusion, or needs some brushing up. The hearings also give insight into what the bar thinks about the work product. On the other hand, a lot of what goes on before the committee in those public hearings could just as well be done on paper without the need for the hearings. A lot of it is posturing by representatives of interested groups, but I think on balance you need the public hearings. They give a sense of life and reality to the process.

Does a lawyer sometimes appear who just wants to make a point for personal reasons?

Yes, like any public hearing you get a tremendous variety of people. So people are sometimes there for a client, or to push a pet project. Still there is enough wheat in the chaff to justify it. Psychologically it is very important to have the process open, and I think one of the reasons that the Congress is very much involved in thinking about federal rule making these days is that there have been accusations that it is a closed process. So I think psychologically and for the good of the profession that opening up the process through public hearings is a good thing.

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Illustrative Rules Governing Judicial Misconduct Published by FJC

The Center recently published *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, a report issued by a special committee of the Conference of Chief Judges of the U.S. Courts of Appeals, chaired by Chief Judge James R. Browning and including Judge Collins J. Seitz and Chief Judge Charles Clark. Anthony Partridge of the Center's Research Division served as reporter.

The illustrative rules, and accompanying commentary, reflect experience with the complaint procedure mandated by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 and serve as a means of sharing both information and ideas. The special committee expressed the view that experimentation with various approaches under the statute is desirable and in conformity with congressional intent. Accordingly, the committee did not urge that the illustrative rules be adopted on a uniform basis, but rather expressed the hope that they might prove a useful reference for those working on revisions of local rules.

Copies of the illustrative rules can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (13 oz). Please do not send an envelope.

JUSTICES, from page 6

of judges over time. I believe that problems are susceptible to rational solution if we work hard at making and understanding arguments that are based on reason and experience.

And with respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies its humanity and dignity of the victim and transgresses the prohibition for that reason against cruel and unusual punishment. For me, that day will be a great day for the country and a great day for our Constitution.

Chief Justice Warren E. Burger at the Fourth Circuit Judicial Conference, June 27, 1986, White Sulphur Springs, West Virginia

Today I want to talk about the Bicentennial programs and projects that are either underway or contemplated. * * *

It seemed to me, from the outset, that we had to distinguish between the kind of celebration we had in 1976, where fireworks and parades were necessarily predominant, and the kind of programs we want for the Bicentennial of the Constitution. There may be some fireworks and there may be some parades, but the important thing here is to give ourselves—and I do not mean just voters out there, I mean all of us—a history and civics lesson about how we got this Constitution and how difficult it was to get it. * * *

"It seemed to me . . . that we had to distinguish between the kind of celebration we had in 1976 . . . and the kind of programs we want for the Bicentennial of the Constitution. . . . [T]he important thing here is to give ourselves . . . a history and civics lesson about how we got this Constitution . . . ."

—Chief Justice Warren E. Burger

[W]e are trying to reach everyone, from the kiddies in the grade schools, the high schools, and up through undergraduate colleges and law schools. We will have a national speakers bureau and every federal judge and every state judge will be invited to tell this story to the community luncheon clubs, the Rotary, the Exchange, the PTA, and the Girl and Boy Scouts. * * *

I have met with some of the leading television and press people, and I have told them, "Here's the story. We know the story. You know how to tell it. Will you please help?" * * *

Congress has given us $12 million, in contrast to the more than $200 million available for the celebration in 1976. Getting more millions in the present fiscal climate is not going to be easy; as you know, we recently had problems securing money for jury fees. For that reason, we are going to have to call on every member of the legal profession of this country to familiarize himself or herself with the details of some of these great episodes and then see to it that this story is told. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Brennan, William J., Jr. "The Constitution of the United States: Contemporary Ratification." 27 *South Texas L. Rev.* 433 (1986).

Brennan, William J., Jr. "What's Ahead for the New Lawyer?" 47 *University of Pittsburgh L. Rev.* 705 (1986).

Cannon, Mark W., and David M. O'Brien (eds.). *Views from the Bench: The Judiciary and Constitutional Politics.* Chatham House Publishers, 1985.

Nathanson, J. Edmond. "Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict." 27 *William & Mary L. Rev.* 331 (1986).

Oliphant, Robert E. "Rule 11 Sanctions and Standards: Blunting the Judicial Sword." 12 *William Mitchell L. Rev.* 731 (1986).

Sand, Leonard B., and Steven Alan Reiss. "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit." 60 *New York University L. Rev.* 423 (1985).

Toran, Janice. "Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68." 35 *American University L. Rev.* 301 (1986).

Weinstein, Jack B. "From the Bench: Warning—Alternative Dispute Resolution May Be Dangerous." 12 *Litigation* 5 (Spring 1986).

Weisberger, Joseph R. "The Twilight of Judicial Independence—*Pulliam v. Allen.*" 19 *Suffolk University L. Rev.* 53 (1985).

Health Plan Open Season

An open season to enroll in or change health insurance plans will take place from Nov. 10 to Dec. 5, the AO has announced.

CALENDAR

Nov. 5–7 Workshop for Trainin Coordinators of the Eleven Circuit

Nov. 10–14 Orientation Seminar fo New Assistant Federal Defende

Nov. 12–14 Seminar for Bankrupt Judges

Nov. 17–19 Jury Management Wor shop

Nov. 19–21 Workshop for Judges of th Fifth Circuit

Dec. 3 Judicial Conference Adviso Committee on Appellate Rules

Dec. 3–5 Workshop for Judges of th Eighth and Tenth Circuits

Dec. 4 Judicial Conference Committe on the Judicial Branch

Dec. 4–6 Workshop for Judges of th Sixth Circuit

JUSTICES, from page 2

Securing equality requires the attention, the energy, and the sense of justice possessed by all the well-intentioned citizens of the society. They need to be assured that the government, the law, and the courts stand behind their efforts to overcome the harm bequeathed to them by the past. They need to know that encouragement and support, not criticism and prohibition, are available from those who are sworn to uphold the law. Courts must offer guidance, to the best of our ability, to the attempts by individuals and institutions to rectify the injustices of the past. We must labor to provide examples of solutions that may work, and approaches that may be tried. If we fail, then we delay or postpone altogether the era in which, for the first time, we may say with firm conviction that we have built a society in keeping with our fundamental belief that all people are created equal.

Justice Lewis F. Powell, Jr., at the Eleventh Circuit Judicial Conference, May 12, 1986, Atlanta, Georgia

I now venture some observations about capital cases in this circuit....

Although the "delay problem" ... remains serious, constructive steps have been taken in the circuit to ameliorate it. Only recently, when I mentioned that I would be here today, the Chief Justice asked me to congratulate the circuit, and Chief Judge Godbold in particular, on the way you are addressing the problem.

I mention only highlights of your action that seem to us in Washington to be so important. Both Florida and Georgia have created state–federal judicial councils—informal liison groups of state and federal judges—to oversee this problem. It may be that Alabama has done likewise.

Perhaps the most critical need is an organized program for the representation by counsel of death row prisoners. The Florida bar is to be commended, and particularly Bill Henry, its president in 1983–84, for leadership in seeking solutions. My understanding is that, because of the inadequacy of using volunteer lawyers, the Florida legislature—at the request of the state supreme court and the bar—has created an office of "capital collateral representation," with state funding. I believe that Georgia and perhaps Alabama have followed suit.

An important state development was the amendment of Florida's rules of criminal procedure to require that a prisoner seeking collateral review must file his petition within two years after his judgment and sentence become final—with limited exceptions.

Your circuit was the first to install a computerized program for keeping all federal judges advised of the status of each case. I believe this is called the Capital Case Status Report. Also you have inaugurated the prior assignment of district court judges and court of appeals panels to particular cases....

"No higher duty exists in the judging process than to exercise meticulous care when the sentence may be, or is, death."

—Justice Lewis F. Powell, Jr.

No higher duty exists in the judging process than to exercise meticulous care when the sentence may be, or is, death. This can and should be done, preserving fully all constitutional rights, without permitting the process of repetitive—and often frivolous—review to drag on for years.

Justice William J. Brennan, Jr., at the Third Circuit Judicial Conference, Sept. 23, 1986, Princeton, New Jersey

I have lived now for several years with arguments supporting and opposing the constitutionality of capital punishment. They come in increasing numbers these days, as the population of death row increases, and executions are now being carried out by the several states....

I have read countless briefs and listened to innumerable oral presentations, and I have been persuaded and remain persuaded that death is unconstitutional. I reach that conclusion based on arguments of lawyers who I am convinced have made the better, and I mean by that the better reasoned, case. Now, this is not to suggest, of course, that underneath the robes I am not—we are all human beings with personal views and moral sensibilities, yes, and religious scruples—but it is to say that above all, I am a sitting judge, required to pass on that issue.

"I am convinced that law can be a vital engine, not merely of change, but of civilizing change."

—Justice William J. Brennan, Jr.

I am convinced that law can be a vital engine, not merely of change, but of civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live. Sometimes, these insights appear pedestrian, such as when we recognize, for example, as we have, that a suitcase is to be treated more like a home than it is like a car.

On occasions those insights form a mens rea, such as when we finally understand that separate can never be equal. I believe that these steps which are the building blocks of progress are fashioned from a great deal more than the changing views

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Draft Guidelines Published, Plea Hearing Held

The Sentencing Commission published a preliminary draft of sentencing guidelines in the *Federal Register* on Oct. 1, 1986. A copy of the draft was also mailed to each member of Congress, Article III judge, chief U.S. probation officer, U.S. attorney, and federal public defender, and to hundreds of private defense attorneys, victims' advocates, criminal justice specialists, private citizens, law enforcement organizations, and interested organizations such as the NAACP and ACLU.

NEWS FROM THE SENTENCING COMMISSION

The commission voted to publish a preliminary draft far in advance of any legal requirement to do so in order to allow for the widest possible public comment and analysis on possible formats, structures, and approaches in developing a guideline system. The FJC committee on education about the 1984 crime control legislation wrote separately to all judicial branch recipients, summarizing the draft's contents and urging them to review it and provide the commission whatever comments they wished.

One of the most pressing policy issues the commission must resolve is the role of plea agreements in a sentencing guideline system. Because it does not want plea agreements to undermine sentencing guidelines, Congress has directed the commission to promulgate general policy statements for consideration by federal judges in deciding whether to accept or reject plea agreements, in order to promote responsible plea agreement practices that do not perpetuate unwarranted sentencing disparities. To that end, the commission held its fifth public hearing in Washington, D.C., on Sept. 23, on the appropriate limits of judicial scrutiny in plea agreements and on related issues. Witnesses included Justice Department officials (including U.S. attorneys), representatives of defender organizations, private attorneys, and law professors. ■

NOTEWORTHY

Attorney access to argument tapes. In response to requests from members of the bar, the Ninth Circuit has changed its policy concerning cassette tapes of oral argument. Attorneys will soon be able to purchase copies of these tapes from the clerk's office. The court's previous policy had been to allow attorneys only to listen to the tapes and have them transcribed. Such tapes are not an official record of the court proceeding. (As noted in Ninth Circuit News.)

* * *

State sentencing guidelines for youths. A study financed by the Justice Department's Office of Juvenile Justice and Delinquency Prevention has recommended that states adopt sentencing guidelines for young offenders. The study was overseen by Ralph A. Rossum, a professor of government at Claremont McKenna College in Claremont, Cal. A 10-member panel of scholars and lawyers drafted the guidelines, which should be published later this year. The Justice Department has not yet formally endorsed the panel's recommendations.

* * *

More lawyers. The American Bar Foundation reports that the number of lawyers in the U.S. increased from 542,205 in 1980 to 655,191 by the beginning of 1985, an increase of 21 percent. In 1985, 70 percent of lawyers were in private practice, and less than 4 percent were employed by the judiciary. Nearly 10 percent of lawyers worked in private industry; slightly more than 8 percent worked in government; 3 percent worked for legal aid organizations, private associations, and special interest groups; and 5.5 percent were retired or inactive. ■

PERSONNEL

Nominations

Patrick J. Duggan, U.S. District Judge, E.D. Mich., Sept. 11
Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Sept. 23
Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Sept. 23
Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Sept. 26
Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Sept. 26
William L. Dwyer, U.S. District Judge, W.D. Wash., Sept. 26
Reena Raggi, U.S. District Judge, E.D.N.Y., Oct. 3

Confirmations

Joel F. Dubina, U.S. District Judge, M.D. Ala., Sept. 12
Alan C. Kay, U.S. District Judge, D. Hawaii, Sept. 12
Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, Sept. 12
Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Sept. 25
James L. Graham, U.S. District Judge, S.D. Ohio, Sept. 25
Frederic N. Smalkin, U.S. District Judge, D. Md., Sept. 25
Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Oct. 8
Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Oct. 8
Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Oct. 8
Patrick J. Duggan, U.S. District Judge, E.D. Mich., Oct. 8
Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Oct. 8
James R. Spencer, U.S. District Judge, E.D. Va., Oct. 8

Appointment

Ronald R. Lagueux, U.S. District Judge, D.R.I., Sept. 5

Senior Status

James Hunter III, U.S. Circuit Judge, 3d Cir., June 30
Otto R. Skopil, Jr., U.S. Circuit Judge, 9th Cir., June 30
Laughlin E. Waters, U.S. District Judge, C.D. Cal., July 6
Warren J. Ferguson, U.S. Circuit Judge, 9th Cir., July 31
Charles E. Simons, Jr., U.S. District Judge, D.S.C., Aug. 17

MILLER, from page 8

Do you feel there is any justification for criticism that some local rules go beyond the national rules?

I think in some limited contexts some of the local rules are a bit pushy. They butt up against the national rules. I think the issue is distorted; I think it is overstated. Some of the rules, I would say, violate the limitation on the local rule-making power. But I don't think this is a major problem. I don't think the inconsistency is as widespread as many people think it is. We've had a tremendous lack of judicial challenges to local rules. You know, we've had rules in most districts limiting the number of interrogatories, which many people say is inconsistent with federal rule 33, which contains no limitation on the number of interrogatories. There seems to be a reluctance to take the issue to the judiciary. If they challenge it, we might get some jurisprudence as to where the line between the local and the national rules is, otherwise that line is always going to be indistinct. Nobody really knows where the line is. I think the new rule 83, which was recently amended, improves the process of local rule making and should quiet some of the criticism.

When you refer to challenges to the local rules, what do you have in mind?

You very often have someone who would like to see a conflict between the local rule and the national rule because it serves his purpose. They take the position that the local rule is invalid for a litigation position. But they never seem to challenge it in court. I think I could count on the fingers of one hand the number of cases in which a local rule has been challenged as violative of the national rules. There's a lot of noise but very little action.

The Advisory Committee on Civil Rules has been called the most vocal proponent of stronger sanctions under rule 68. Bills are pending in both the Senate and the House to amend the rule, the Supreme Court has more than once upheld rule 68, and now there are movements among the bar membership to rewrite the rule. Are you of the belief that rule 68 needs to be redrafted?

Rule 68 was the most controversial subject during my tenure as reporter. In retrospect it seems to me that we got the massive changes to rules 11, 16, and 26 through in '83. And then this firestorm developed about rule 68. Our intent in the committee, and my intent as reporter, was to try and develop rule 68 into a provision that would force the litigants to consider settlement very, very seriously as early as possible in the litigation. I wish I had a dollar for every case that was settled on the courthouse steps just before trial. If it settles then, it could have settled a year or two earlier. So rule 68 was designed to be a pushing mechanism that says, "Look; think about settlement." Everyone who came in to testify about it saw phantoms. They all had horror stories. It was like Chicken Little saying "the sky is falling!" They were scared. I have never seen such a chamber of horribles paraded in my life.

This was at the public hearings?

Yes. I have in my office at least three feet of paper attacking rule 68.

I will go to the grave believing that what we tried to do in rule 68 was right; that the only way you are going to get lawyers to evaluate their cases seriously is if you put a little bit of a gun to their head. And that is what rule 68 was designed to do.

Set a trial date?

Set a trial date; make an estimate of your case and if you are really, really way off the track—if it looks as if you are playing dog in the manger—then you should pay the expenses of your opponent.

"I will go the grave believing that what we tried to do in rule 68 was right."

Do you believe the language of rule 16(c)(7) is sufficient authority for the institution by the district court of an experimental court-annexed arbitration program?

When we drafted rule 16(c)(7) in the Advisory Committee, part of our intention was to encourage what we call interim, extra-judicial dispute resolution techniques. We wanted to give the courts authority to use this almost smorgasbord of alternative dispute resolution techniques that have been developed in recent years. So we thought that the rule coupled with the inherent power of the federal courts would be enough to develop arbitration mechanisms. That was our intention.

You have written extensively on class actions and rule 23. There were proposals to restate rule 23 eight years ago, but the committee decided to wait because it appeared that Congress might legislate in this area. Does it now seem timely to restate rule 23? If it does, in what way?

I think it is time to go back to rule 23. Rule 23 has been like a religious war for many, many years. It is one of those subjects in which you get incredible cleavage and disagree-

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MILLER, from page 9

ment between the plaintiff's bar and the defense bar. And the rhetoric and the emotion of the late '60s and the early '70s always struck my funny bone as being a religious war between the plaintiff's bar and the defense bar. I think a lot of the hysteria about the rule has quieted down. And I think it is time to lift the moratorium, and go back to rule 23 and take the more than 20 years' experience we have had under it and see if we can't build a better mousetrap. I think there are ways of improving the rule in terms of the notice requirement, in terms of describing what are proper class actions, improving descriptions of subclassing and the judicial powers in class actions. And I think that the Supreme Court's decision a year ago in *Phillips Petroleum v. Shutts* requires some rethinking of what the rule should say. (I must drop a footnote here and say I am a little bit crazed about this, since I argued the case.) I think we have now hit the point where we can make a reasonable reevaluation of class actions.

"Rule 23 has been like a religious war for many, many years."

Do you believe that the traditional teaching methods used by most law professors and law schools are still those best suited to today's curriculum? Which teaching methods work best?

I have always believed that there is no one teaching method. The best teacher is the teacher who teaches in a style comfortable to himself or herself. There is no magic in the Socratic method or the problem method or the lecture method. Different suits fit different people. I am fairly clear that the days of the pure Socratic method are over. That was fine in a world in which everything was common law and in which everything was case law. I don't think you can teach purely Socratically. I don't teach purely Socratically. There are things that I lecture on, there are things that I use the problem method on. There are things I will teach through "moot courting" within the class. So everybody should do his or her own thing. What I do feel very strongly about, however, is that the classroom experience should be an intense experience. Our job as law teachers is to teach and develop professionals. The life of the professional is one of intensity. It is one of high drama. It is one in which you can't say "I am unprepared" to a judge or to your client or to the person with whom you are negotiating.

I must say, at the risk of being accused of being an old fuddy-duddy and Attila the Hun and all of that, that a law school environment that is preoccupied with sensitivity—to the exclusion of building strong, dynamic, intense professional instincts of preparation, of thought, of responsibility, of analysis—is just an education system that is off the track. I know it is fashionable these days, since most younger academics come out of the student revolution period, to do it in a very relaxed manner and I certainly wouldn't want a faculty of 70 people who all behaved like Attila the Hun. But I think a mixture of people who treat their classroom as if it is a courtroom and those who are more gentle and on a first-name basis and wear turtleneck sweaters is probably a good idea. I really and truly mourn the loss of intensity and direction and drive in the classrooms of many American law schools.

I think in retrospect it is better to say that in my earlier years as a teacher, in the mid '60s, I was very much like Kingsfield. I insisted on preparation. There were times when I would literally throw somebody out of class for being unprepared.

What caused the change?

You roll with the times. What was acceptable in the '60s in terms of pressure and intensity, after the student revolution became unacceptable, so you have to make a deci-

See MILLER, page 11

Center Publishes Paper on Taxation of Attorneys' Fees

In response to a call for study of alternative means of managing the increasing number of attorney fee petitions in the federal courts, the Center recently published *Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts*, by Alan J. Tomkins and Thomas E. Wilkins. The report describes the distinctive approaches to taxation of attorneys' fees that have evolved in the English, Alaskan, and U.S. federal court systems.

In England, where fee shifting from the losing to the winning party is the norm, taxing masters and a large clerical staff undertake the calculation and assessment of attorneys' fees from a centralized office in London, in addition to whatever taxing of attorneys' fees is done locally. In Alaska, with a pervasive statutory system of fee shifting, the use of fee schedules and relatively informal procedures allows judges to make quick, often intuitive judgments about fees without a major investment of resources. To manage the growing number of fee petitions in federal courts, these courts have developed a diverse set of innovative approaches to fee taxation.

After outlining the approaches of the three systems, the authors examine further possible applications of the various approaches to the federal system, focusing on three primary issues: whether procedures should be standardized, whether new fee decision makers should be substituted for the judicial officer who hears the case, and whether the taxation function should be centralized.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, D.C. 20005. Please enclose a self-addressed mailing label, preferably franked (16 oz.), but do not include an envelope.

MILLER, from page 10

sion about maintaining your own effectiveness as a teacher. If you push too hard, if you hit people too hard, they will just go away; they will close down. So, instead of the hammer I went to the rubber mallet—not quite the velvet glove. I try to maintain the intensity by telling everybody, "It is a collaborative, intense process. Let's work hard. Let's share." So, I just felt that by backing off a little bit I could stay in tune with the sensitivity that followed.

You are doing a study for the American Law Institute. Please tell us about that.

The American Law Institute has commissioned a preliminary study to look at complex litigation—*big* cases—to see if there are things we can do with a wide range of subjects: the federal rules, the subject-matter jurisdiction principles we live with, venue principles, removal. The chairman of the advisory committee is Justice Wilkins of Massachusetts. Our job is to determine the feasibility of, in effect, building a better mousetrap for complex cases and to recognize that we need more intersystem cooperation. A jet plane goes down and you end up with 50 cases. A product failure produces hundreds of pieces of litigation—like the asbestos cases. Can we devise better procedures, better subject-matter jurisdiction rules, better cooperation between courts, state and federal, new notions of choice of law to handle these monstrous—and that's what they are—cases? They are like millstones on the back of our judicial system.

And they cause bankruptcies.

That's right. Tying up judges for years and years and years. And we know asbestos is not a unique situation. Today's asbestos will be tomorrow's toxic dump phenomenon. Our job is to spend two years to prepare a report to give to the Institute so that the Institute can decide whether to commission a full project that might produce something like the CAI study in the late '60s on the division of jurisdiction between the state and the federal courts. In a curious way this project might be thought of as "son of the old division of jurisdiction study"—which was a brilliant study.

Do you have the feeling your students are a little bit frightened of you at first? Do you get them first year?

Yes. I have, and always have had, the experience of teaching a big, full-year course in civil procedure to, now, one-fourth of the first-year students at the Harvard Law School. There is a cult about me that I am Kingsfield from the "Paper Chase" program. The cult is perpetuated by upper-class students who love to terrorize the first-year students. In other words, a first-year student, by the time that student walks into my class, has been told by a third-year student it is going to be "blood and guts" in there, and I am amused by it because I am nothing like that. I'm a pussycat. One of the things that bugs me is when students of mine from 10 to 20 years ago come to the law school to do interviewing for hiring, and they sneak into the back of my class and they watch me teach today. At the end of the class, they come up to me and they are furious. They say, "You have become a Casper Milquetoast. You are too gentle; you are too nice. The reason I remember civil procedure, the reason I am a litigator, is because you forced me to learn. You created an environment in which it was literally easier for me to study and be prepared than to go through the emotional risk of being unprepared and being embarrassed."

You mean the 10-volume Charles Alan Wright jurisdiction study?

Yes. That was by Charles Alan Wright and Dick Field, and it is a brilliant piece of work that never was actualized. There was not enough pressure in Congress to do anything about it. This time there is such recognition that we are in crisis on the civil side with these new types of cases that maybe something can be done.

An ABA commission chaired by Justin Stanley released a report in August that concludes that many aspects of the practice of law in this country should be changed. Do you agree?

I think these are bad days for the American legal profession. I think the image of the American lawyer today is the image of people flocking to Bhopal, flocking to the crash of Delta 191 in Texas. I think the profession has got to get ahold of itself. We have got to clarify some of the rules about professionalism. You can't pick up any of the legal journals, any of the legal newspapers, any of the major newspapers in this country without seeing an article about law becoming a business—because of the scale, the stakes and the money, the masses of young people being churned out by the law schools and then chewed up by the big firms, and the escalation in starting salaries. I think it is a good time to step back and take a very close look at who we are, because I think we are in danger of losing our way. ■

Position Available

Administrative Assistant to the Chief Justice of the U.S. Statutory position. Reports to the Chief Justice. Responsibilities include providing administrative assistance in the Chief Justice's nonadjudicatory responsibilities, involving the Judicial Conference, FJC, and AO; serving as liaison with the executive and legislative branches, state organizations, and private organizations; assisting in the preparation of addresses and publications; participating in the Chief Justice's internal management of the Court, including budget, personnel, and other administrative matters. Must have J.D. or Ph.D. or equivalent, 10 years' relevant experience, familiarity with the federal judiciary, commitment for as few as 2–3 years. Salary commensurate with experience, not to exceed that of a U.S. district judge. Send resume and no more than 3 letters of reference by Nov. 17, 1986, to Elizabeth L. Saxon, Personnel Officer, U.S. Supreme Court, Washington, DC 20543 (202/479-3404).

EQUAL OPPORTUNITY EMPLOYER

AO, from page 3

share of the judiciary's staffing and budget levels has declined substantially over the last few years.

The report recommends that the AO take a more active role in helping the courts in dealing with the General Services Administration, that it be freed from the "bureaucratic red tape" imposed by civil service laws and the Office of Personnel Management, that it continue to work openly and cooperatively with the U.S. Marshals Service to improve court security, and that it improve its relationships with members of Congress to see that Judicial Conference-recommended legislation is introduced promptly and pursued vigorously. The committee also suggested that the future relationship between the AO and the FJC may require further study by the Conference.

The committee concluded that "no fundamental change in the structure of the office is needful or wise." The committee did find, however, "that there is demonstrated need for a more efficient and responsive administration of the responsibilities of the AO." The committee expressed its belief that "Mr. Mecham has a full understanding of this need," and that he "has already taken action to effect remedies in many areas." ■

CONFERENCE, from page 1

- Approved the transmittal to the Supreme Court of amendments to the bankruptcy, civil, and criminal rules, and recommended Supreme Court approval and transmittal of them to Congress; also approved amendments to the civil, criminal, and evidence rules to eliminate all gender-specific language.
- Directed the AO to study the possibility of the judicial branch's undertaking its own building design, leasing, construction, and maintenance.
- Voted to oppose any change in 28 U.S.C. § 569, which provides that U.S. marshals "may, in the discretion of the respective courts, be required to attend any sessions of court."
- Authorized a temporary increase in court reporters' transcript rates for transcripts not paid for by the government.
- Agreed to numerous changes in official duty stations and places of holding court for bankruptcy judges.
- Reviewed a report of the Judicial Council of the Court of Appeals for the Eleventh Circuit concerning Judge Alcee L. Hastings and invited Judge Hastings to submit a written response.

Congressman Neal Smith (chairman of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies), Congressman Robert W. Kastenmeier (chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice), and Attorney General Edwin Meese III addressed the Conference. ■

BICENTENNIAL, from page 4

the branches of the federal government contribute to the preservation of individual liberty and the functioning of our government?" All entries must be postmarked by Apr. 15, 1987. Entry forms and rules are available from Education Program, Commission on the Bicentennial of the U.S. Constitution, 736 Jackson Place, N.W., Washington, DC 20503.

- The American Judicature Society has put out a call for manuscripts to be published in *Judicature* for a symposium issue devoted to the Constitution. The topic suggested is "the relationship between the Constitution and the judicial system, with particular reference to Article III and Amendments IV through VIII." Other subjects such as judicial independence and judicial federalism are acceptable, however. Publication is planned for the August–September 1987 issue, and manuscripts should be submitted by Mar. 15, 1987, to the AJS office, 25 E. Washington St., Chicago, IL 60602. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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Chief Justice Sends Holiday Message; Notes Progress, Challenges

I am delighted to take this opportunity to extend a holiday greeting to my colleagues on the federal bench and to our extended "court family." I am still in the process of getting my feet wet in my job as Chief Justice, and I owe much to Chief Justice Burger for his gracious assistance in "showing me the ropes." My appointment as Chief Justice has surely not lessened the bond I feel with my fellow judges; indeed, by assuming the office of Chief Justice my opportunities and obligations to maintain the health and welfare of the federal judiciary have dramatically increased. I cheerfully accept that responsibility, and look forward to working with other judges, the Administrative Office, and the Federal Judicial Center in meeting the challenges that face our courts. I ask for your wise counsel, your help, and your patience as I begin.

Under the leadership of Chief Justice Burger, progress has been made over the last year on a number of fronts. The Judicial Survivors' Annuities Reform Act was signed by the President on June 19, providing a floor of financial security to spouses and children of deceased federal judges. We all will be watching closely the progress of the recommendations of the Commission on Executive, Legislative, and Judicial Salaries, which will be submitting its report to the President by Dec. 15. Thanks are due to Judge Coffin and the other members of the Committee on the Judicial Branch for their extra efforts in support of the work of the Commission. In October, Congress authorized an increase in the number of bankruptcy judges from 232 to 284. As soon as an appropriation is added to this authorization, our hard-working corps of bankruptcy judges can look forward to some relief.

As the new Chairman of the Judicial Conference, I shall be open to suggestions as to how the work of the Conference can be furthered. The Conference has authorized me to appoint a committee to review the way the Conference operates and to evaluate the adequacy of the current committee structure. The last time such a committee sat was in 1968, and I thought it was time for another look at the subject.

Mrs. Rehnquist and I wish you and your families—wherever you may be throughout our broad land—a joyful holiday season and a healthy and productive New Year.

Sincerely,

William H. Rehnquist

Judge Wisdom on Courts' "Federalizing" Role, Judicial Independence, and Size of Circuits

Judge John Minor Wisdom was born in New Orleans, received his A.B. from Washington & Lee University and his LL.B. from Tulane Law School, and practiced law in New Orleans from 1929 to 1957. From 1938 to 1957, with an interruption for military service, he also taught law at Tulane. The judge served in the U.S. Army during World War II and was separated from the Army in 1946 with the rank of lieutenant colonel.

Nominated to the Fifth Circuit in 1957, Judge Wisdom has served as a member of the Judicial Panel on Multidistrict Litigation (1968–79), and as the panel's chairman (1975–79), and for three years on the Advisory Committee on Appellate Rules. He has also served since 1975 on the Special Court organized under the Regional Rail Reorganization Act of 1973. Judge Wisdom is the author of numerous scholarly publications and the recipient of a number of honorary degrees and awards, in-

See WISDOM, page 4

New Drug Act Will Have Impact Upon Courts' Caseload

The Omnibus Drug Enforcement, Education, and Control Act of 1986, passed by Congress (H.R. 5484) and signed by the President as P.L. 99-570 on Oct. 27, includes a number of provisions either directly affecting the judiciary or of interest to it. The legislation:

- Authorizes $17 million for FY 1987 for the U.S. Marshals Service.
- Authorizes an additional $124.5 million for the federal prison system in FY 1987.
- Authorizes $2 million for the Justice Department's Bureau of Justice

See DRUGS, page 9

FY 1987 Appropriation Authorizes 3 Percent Cost-of-Living Raises, Filing Fee Increases

The federal courts' fiscal year 1987 appropriation provides a total of $1,192,592,000 in budget authority for the judiciary, an increase of $161,435,000 over FY 1986. The budget includes $37,500,000 appropriated under a separate title, the Omnibus Drug Supplemental Appropriation Act of 1987. (See story on omnibus drug legislation, p. 1.) It also provides for a cost-of-living salary increase of 3 percent, effective as of the first day of the first pay period commencing on or after Jan. 1. Justices and judges of the United States will also receive this increase.

Several separate appropriations for the salaries and operations of the court system have been consolidated into a single appropriation, "salaries and expenses," which will provide flexibility to reprogram funds between personnel and general operating expenses when needed.

The FY 1987 budget authorizes 540 additional positions for clerks' offices and probation and pretrial services offices (with total staffing still capped by Congress at 94 percent of the Judicial Conference-approved formula allowances), 7 new full-time magistrates and their supporting staffs, and 124 other supporting personnel.

Fees collected for the preparation and mailing of bankruptcy case notices will be used to offset the salaries and expenses incurred in providing these services. Since the FY 1987 estimate for such fees totals $3 million, a reduction of $3 million was made to "expenses of operation and maintenance of the courts."

Filing fees. The legislation has doubled the fee for filing civil cases from $60 to $120, and has raised the fee for filing in bankruptcy court from $60 to $90. The Judicial Conference Committee on the Budget last March had proposed consideration of an increase in filing fees. Although the Judicial Conference Committee on the Budget had made its recommendation with the expectation that the increased fees could go into a special account for use by the courts, these increases will be

See BUDGET, page 8

JSAS Reminder

Article III judges are reminded that from now through March 1987, a one-time Judicial Survivors' Annuities System (JSAS) "open season" is being held, during which new coverage may be elected or existing coverage may be withdrawn.

Judges presently covered by JSAS who wish to retain their coverage need take no action. Judges who previously waived the right to elect coverage under JSAS within six months of assuming judicial office or subsequent marriage may now elect such coverage. This is a one-time election opportunity, and such election is irrevocable. A completed AO Form 162, *Election to Participate in the Judicial Survivors' Annuities System*, must be received by Mar. 31, 1987, by the AO, JSAS Section, Washington, DC 20544.

Judges currently participating in JSAS who now wish to revoke such election may do so. This is a one-time opportunity to revoke election to participate. Revocation must be in writing and received by the director of the AO no later than Mar. 30, 1987 (no special form is required; a letter is sufficient).

Judges are reminded that before making a final decision concerning JSAS, they should consider life insurance coverage offered either by private companies or through the federal employees' program, as an addition or alternative to JSAS.

More detailed information about the open season is provided in a Sept. 26 memorandum from AO Director Mecham to all Article III judges.

Sixth Cir. Hosts Innovative State-Federal Meeting

The Sixth Circuit, in a variation on the usual format of state–federal judicial council meetings, held a meeting that included judges from all of the states embraced by the circuit. Chief Judge Pierce Lively invited judges from Kentucky, Michigan, Ohio, and Tennessee to a one-day meeting in Cincinnati with four appellate and four district judges.

Chief Justices Frank Celebrezze (Ohio) and Ray Brock (Tenn.) and Associate Justices Donald Winterscheimer (Ky.) and James H. Brickley (Mich.) were accompanied by six state intermediate appellate and trial judges. The heart of the agenda was a presentation on recent habeas corpus developments by Professor Ira Robbins of the Washington College of Law at the American University.

On a related matter, prisoner civil rights suits, Chief Judge Lively called the group's attention to the provisions of 42 U.S.C. § 1997e, which allows federal judges to continue prisoner § 1983 filings for 90 days to allow exhaustion of prison grievance procedures if those procedures have been determined, either by the Attorney General or the district judge in the case, to be "in substantial compliance with minimum acceptable standards."

The FJC continues to provide funding for federal judges' attendance and for some programs at state-federal council meetings. ■

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

Ninety-ninth Congress Ends Session with CJA, Bankruptcy and Immigration Changes

The following legislative items, enacted in the closing days of the 99th Congress, are of interest to the judiciary. (See also related stories on the budget, p. 2, and on omnibus drug legislation, p. 1.)

Criminal Justice Act. H.R. 3004, amending the Criminal Justice Act (CJA), has been signed by the President. The bill amends the CJA provisions relating to fees for court-appointed attorneys in criminal cases, and the provisions relating to the recall to service of certain judges and magistrates.

House Judiciary Committee members Robert Kastenmeier (D-Wis.) and Carlos Moorhead (R-Cal.) sponsored the legislation amending the CJA, which was introduced at the request of the Judicial Conference. The bill retains current law authorizing hourly rates of up to $40 an hour for out-of-court representation and $60 an hour for in-court representation under the CJA. The bill allows payment of up to $75 per hour if the Judicial Conference determines a higher rate is justified for a particular district or circuit. The new general maximums per case would be $3,500 for a felony, $1,000 for a misdemeanor, $2,500 for appeals, and $750 for other cases—modest increases over the previous amounts. These maximums can be waived by the chief judge of the circuit or his or her designee. The bill also makes other technical changes in the CJA requested by the Judicial Conference.

The bill as passed also provides for the recall to service of U.S. magistrates who have retired. (Similar authority already existed to recall to service bankruptcy judges and judges of the U.S. Claims Court.) The bill also enhances the system for the recall of magistrates, bankruptcy judges, and judges of the Claims Court.

In the past, bankruptcy judges and Claims Court judges recalled to service were effectively required to "punch a time clock" for the first time in their careers; for the hours that such an official was working, retirement annuity was deducted from the official's pay, with the result that the judge provided full-time service for part-time pay. Moreover, there was no guarantee that such an official would be recalled for more than one assignment, creating uncertainty as to the amount of income he or she could anticipate.

The bill improves the situation by providing that the circuit judicial council, or the chief judge of the Claims Court, can certify that an officer recalled to service will perform "substantial service" during a five-year period of recall. During the five years, the judge or magistrate will receive the difference between the retirement annuity and the salary of the position. The Judicial Conference is authorized to promulgate regulations necessary to implement the new system.

Bankruptcy judgeship legislation. The bankruptcy legislation passed by Congress, H.R. 5316, and signed by the President on Oct. 27, authorizes the creation of 52 new bankruptcy judgeships, although it provides no funds to implement the new judgeships. The bill also provides significant farm bankruptcy reform. (See the budget story, p. 2, for additional information about this bill.)

Immigration bill. The major overhaul of immigration legislation, S. 1200, was signed by the President on Nov. 6. The bill includes both civil and criminal sanctions against employers knowingly hiring illegal aliens, an increase in the penalties for document fraud, and provisions for improving the documentation used to verify employment authorization. The bill provides an amnesty for illegal aliens who can prove that they have been resident in the United States since 1982, as well as for certain agricultural workers.

An office of special counsel will be established within the Department

See LEGISLATION, page 9

Spanish/English Interpreting Test To Be Given

The written test for Spanish/English federal court interpreters will be given on Mar. 7, 1987, the only time the test will be given in 1987. All applications must be postmarked no later than Dec. 31, 1986. An oral test for candidates successful in the written test will be given in the summer of 1987. Persons who successfully complete these tests will be placed on an eligibility list from which court interpreters may be selected.

The written and oral tests are given only in certain cities. The fee is $25, and the tests are being administered by the University of Arizona Federal Court Project, Federal Court Interpreters Certification Project, Modern Language Building, Room 456, University of Arizona, Tucson, AZ 85721, Tel. 602/621-3687.

200 Years ago...

ecember 1786: Rebellion broke out ross New England as angry farmers osed down courts, ordering judges in e Massachusetts county "not to open d courts, at this time, nor do any kind business whatsoever" lest their judgnts "by reason of the great scarcity of h . . . fill our gaols with debtors." The mers, beset by creditors and tax coltors and angry at the state's suspenn of the writ of habeas corpus, were ght up in a larger crisis caused partly the lack of any central authority to ulate foreign trade and by the dearth hard currency throughout the states. ys's Rebellion was quelled by June, not before casting what John rshall called "a deep shade over the ght prospect which the revolution in erica and the establishment of our governments had opened up.... I r that we may live to see another olution."

BICENTENNIAL OF THE U.S. CONSTITUTION

WISDOM, from page 1

cluding the Tom C. Clark Equal Justice Under Law award, given by Phi Alpha Delta.

In the recent tribute to you in the *Tulane Law Review*, Judge Elbert Tuttle states that you turned down an offer of a circuit court judgeship four years prior to accepting a judgeship. Why did you decline that first offer from President Eisenhower?

Frankly, in 1953 I was in the distasteful position of having a lot of unfulfilled political commitments I had to take care of before accepting a judgeship. I led the fight for Eisenhower in Louisiana in 1952, just as Elbert Tuttle did in Georgia.

You may recall that the decisions on the convention contests in Georgia, Louisiana, and Texas determined the nomination of Eisenhower. Eisenhower supporters in Georgia and Texas had their preconvention troubles, but we had a longer, more difficult struggle to dislodge the old-line Taft Republicans because of rigged Louisiana laws designed to keep the Republican Party small. Anyway, I had lunch with Elbert before talking with Herb Brownell, then attorney general, who was the real political genius in the Eisenhower nomination. I explained my reasons for declining a judgeship and highly recommended Elbert. My recommendation was unnecessary, except to show that I did not regard the judgeship as Louisiana's seat on the court. Herb was well aware of Elbert Tuttle's qualifications. Elbert was then general counsel for the Treasury Department, so it was some time before he could leave that position.

It was an act of God that Elbert was the first Eisenhower appointee to our court. He made a much better chief judge during the critical years of civil rights turmoil than I would have made. And I am not just trying to be modest. I consider Elbert Tuttle and Henry Friendly two of the finest judges on the federal bench during my lifetime. Alvin Rubin is right up there too. That's a long, circuitous answer to a simple question.

Was the court of appeals, rather than the district court, your first choice?

The court of appeals was my only choice. I would not have made a good trial judge. I do not like to shoot from the hip, and in the course of a trial a district judge has to shoot from the hip. I prefer taking my time over a case, sometimes too much time. I like to write and rewrite and then rewrite. I admire good trial judges. I respect them and I consider experience as a trial judge a very valuable asset for an appellate judge. It is not only valuable for the judge but it is good for the morale of the system for federal trial judges to be promoted to the court of appeals. There should be more district judges promoted to the courts of appeals. But I was just not cut out to be a trial judge.

Specialized courts in the federal system have been the subject of discussion for many years. Do you favor the concept of having special courts, or do you adhere to the concept that the federal judges are and should remain generalists?

Well, I believe in a generalist concept for most courts, including the courts of appeals; however, the Special Railroad Court was an absolute necessity. The litigation was massive. You have no idea how massive it was. I guess I had 30 or 40 shelf feet of briefs and other Railroad Court legal material. A special court was necessary for that type of litigation.

I do not object to a special court for tax law, for patents, and for a few other subjects, including Social Security cases. It is a bit ridiculous for the courts of appeals to have to review appeals on Social Security cases which have already gone through the agency system and the district court. Although I feel that appellate judges must become generalists, if they are not already, I feel certain that a good lawyer will make a good judge, regardless of how specialized his practice might

See WISDOM, page 5

PERSONNEL

Appointments

Joel F. Dubina, U.S. District Judge, M.D. Ala., Sept. 18

Charles R. Simpson III, U.S. District Judge, W.D. Ky., Oct. 15

Elevations

Robert W. Warren, Chief Judge, E.D. Wis., Sept. 1

William J. Bauer, Chief Judge, 7th Cir., Sept. 29

Charles L. Brieant, Chief Judge, S.D.N.Y., Oct. 1

Frank H. Freedman, Chief Judge, D. Mass., Oct. 18

Senior Status

John W. Reynolds, U.S. District Judge, E.D. Wis., Aug. 31

Constance Baker Motley, U.S. District Judge, S.D.N.Y., Sept. 30

Andrew A. Caffrey, U.S. District Judge, D. Mass., Oct. 17

William J. Ditter, Jr., U.S. District Judge, E.D. Pa., Oct. 19

Robert R. Merhige, Jr., U.S. District Judge, E.D. Va., Nov. 30

Deaths

Ben C. Duniway, U.S. Circuit Judge, 9th Cir., Aug. 23

Charles E. Wyzanski, Jr., U.S. District Judge, D. Mass., Sept. 3

Edwin A. Robson, U.S. District Judge, N.D. Ill., Oct. 21

CALENDAR

Dec. 3 Judicial Conference Advisory Committee on Appellate Rules

Dec. 3–5 Workshop for Judges of the Eighth and Tenth Circuits

Dec. 4 Judicial Conference Committee on the Judicial Branch

Dec. 4–6 Workshop for Judges of the Sixth Circuit

Dec. 11–12 Judicial Conference Committee on Administration of the Magistrates System

Dec. 15–16 All Judicial Conference Subcommittees of the Committee on Court Administration: Supporting Personnel, Judicial Statistics, Federal–State Court Relations, Judicial Improvements, Federal Jurisdiction

WISDOM, from page 4

have been. Judge John Brown, for example, specialized in admiralty, but he has been an exceptionally fine, versatile judge.

Going back to the Railroad Court, most of our time was spent on constitutional questions and statutory interpretations. For administrative law questions, we had a great authority in Henry Friendly. For a time Carl McGowan served on the court. He is extremely well informed on railroad law, besides being an outstanding judge.

The Special Court was created under the Regional Rail Reorganization Act of 1973. You became a member of this court in 1975, and presiding judge last April. Did you raise any objections to taking on this additional assignment? Why did you elect not to use special masters?

We considered using special masters, but decided that the use of masters—studying their reports—would double the time we would have to spend on the work. All of the judges on the court and most of the lawyers who were involved think that it was a wise decision.

So you became a specialist yourself.

Not really. No one could feel like a specialist in the presence of Henry Friendly, who had so much special and, for that matter, so much general knowledge of the law.

Was your routine workload reduced to accommodate this extra activity?

The Special Court was a lot of work but I did not reduce my routine work until I assumed senior status. I still sit more often than the active judges. For example, I will sit nine times (four-day weeks of twenty cases) this term, not counting hearings of the Special Court. Active judges in the Fifth Circuit sit seven times. But I don't do as much work as they do, because they handle screening, administrative orders, en banc hearings, and other matters which I do not handle. And I manage to get in a little bridge at lunch.

> **"I strongly disapproved of splitting the Fifth Circuit . . . in the '60s . . . . I disapproved of it in 1981. I disapprove of it now."**

You have written approvingly about the important role played by federal courts in your circuit in ensuring the rights of defendants in state criminal proceedings. You have also said that the "only sensible solution to the problem of overloaded [federal] courts is a major reduction in federal jurisdiction." Did you have specific statutes in mind?

I feel strongly that Congress some day will have to face up to the fact that the question of overloaded federal courts cannot be solved by adding judges and splitting circuits. What must be done is to greatly reduce federal jurisdiction, but I would not do so to any major extent in criminal proceedings. I must say, however, that I am strongly opposed to the ongoing process of extending *Younger v. Harris*. I would curtail the expansion of *Younger v. Harris* and its progeny. Abstention is out of hand. The proper applicability of section 1983 (which was the main part of the Civil Rights Act of 1871) seems to have been lost in the glorification of states' rights. Our (with a little *o*) federalism works because of the supremacy of what is called "federal law" but is really national law. I do not like to see it whittled down. The views of some persons suggest that they think that the country is still operating under the Articles of Confederation.

I would get rid of diversity jurisdiction. It has long outlived its usefulness. There is nothing wrong with our state courts, and there is no reason why they shouldn't handle diversity cases. It is downright silly, for example, for a panel of three Texas judges, as sometimes happens, to make an educated guess on the meaning of an article in the Louisiana Civil Code. Certification is not a good solution, because it is cumbersome, time-consuming, and increases litigation costs. Sometimes, too, a state supreme court tells us that we asked the wrong question or that we should decide the question ourselves. I know that many say that it is politically unrealistic to talk about abolishing diversity jurisdiction, but I hear that objection about many legislative reforms.

Is it the trial lawyers who stop it in Congress?

That is probably true. They have

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some very persuasive advocates, some very distinguished lawyers—John Frank, for example.

Aside from the burden of the caseload, one of the troubles is that the civil jury in diversity cases has run wild. (I am aware of opinion to the contrary.) But far be it from me to slander a system sanctified in this country; mistakenly linked with Magna Carta, but abolished in England in 1933.

Among other things you have served on the Judicial Panel on Multidistrict Litigation. Over the years have you seen progress made in procedures for complex litigation and how the work of this panel has developed? Do you have suggestions for further improvements?

I served on the Multidistrict Panel for about 10 years and succeeded Al Murrah for a number of years as chairman or presiding judge. Let us not forget the transferee judges, the judges to whom these cases are transferred for trial. These cases are burdensome and often very complicated. The early heroes were Al Murrah, Bill Becker, Ed Robson, Hubert Will, Joe Estes, and a few others I could mention, especially those who worked on the first *Manual for Complex Litigation*. Sam Pointer has recently done a monumental job in revising the *Manual*. The practical value of the *Manual* and the examples furnished by the transferee judges who have handled these complicated cases and exchanged ideas cannot be overestimated as a substantial step forward in our procedural process.

They were the pioneers when so many of the electrical equipment cases were filed all over the country.

Yes, they got the idea together, and there are some of these and, later, other judges whose names I have omitted. Ed Weinfeld was a tower of strength on the panel. He is a tower of strength on any court, committee, or whatever he does.

It is an important part of federal court history.

Yes. Somebody should do a good law review article on the Multidistrict Panel, and somebody should do a good law review on the Railroad Court. I discussed the Railroad Court briefly in an article I wrote as a tribute to Henry Friendly in the *Pennsylvania Law Review*, and Henry discussed it in a recent issue of the *Tulane Law Review*. Each deserves a study in depth.

"[W]e have too many en bancs . . . . En bancs undermine the force and legitimacy of panel decisions."

You have written that you consistently disapproved the splitting of the Fifth Circuit, and you referred in this context to the "federalizing function" that a circuit court fulfills. Would you elaborate, please.

Well, you touched a nerve there. I strongly disapproved of splitting the Fifth Circuit some years ago, back in the '60s, when it was a ploy to reduce the authority of our court in civil rights cases. I disapproved of it in 1981. I disapprove of it now. I disapprove of it on principle, wholly aside from civil rights. Federal judges are appointed to carry out judicially national and federal policies. The broader the base on which their selection rests the less exposed they will be to what I call parochial prides and prejudices, many of them deep in our subconscious. We are able to perform our federalizing function better if we have a broad base for the selection of judges. I consider our federalizing function more important than our dispute-settling function. This was a function that was especially important in the '60s and '70s and is important at all times. The only good reason—but I don't consider it a good enough reason for splitting the circuit—is the resultant unwieldy character of an en banc hearing when you have a large number of judges on a court. But we have too many en bancs anyway. En bancs undermine the force and legitimacy of panel decisions. A large court need not be unmanageable. Take the Ninth Circuit, for example: Jim Browning and the other judges on that court are doing a superb job, regardless of the number of judges on the court. There is nothing wrong with having a large number of judges on a court. You get a better mix of judicial and nonjudicial backgrounds. It is a good thing. I would not object to a circuit composed of noncontiguous states of different sizes; the improvement of transportation facilities makes this idea feasible. The cross-fertilization of ideas is good for federal courts. What I am fearful of is the prospect of further subdivision of circuits. Perhaps one day we shall have single circuits for New York, Texas, California, and Florida. Should that ever take place, God forbid, you can kiss Madison's federalism good-bye.

What about the extra costs incurred in a large circuit?

The cost is really infinitesimal compared with the advantages of not splitting circuits.

Maybe the judicial branch should be more demanding of Congress.

Well, I really don't know. I am sure that we could all use more money, whether it is the Administrative Office or the judges. I had a law clerk last year who was ashamed to tell me how much he was making, just starting as a law-

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er, because his salary was larger han mine.

You have written about "dual fed-ralism." Would you comment on his.

Well, I have thought a lot about his from time to time. I taught a hort summer course on compara-ve federalism, considering Canada, ustralia, and the United States. Eu-peans generally, and lawyers in her countries, have never under-ood why we have a dual *judicial* stem. They have workable federal-ms with essentially one judicial stem, and I suppose we could too. it considering the structure of our vernment and not just the literal xt of the Constitution, we have ef-cted a reasonable compromise of ntrifugal and centripetal forces sed on the idea that the states ould maintain a measure of sover-gnty. We cannot get away from at, nor should we. I feel very ongly, however, that the primary nction of federal courts is to pro-t federally guaranteed and feder-y created rights. This is not the ce to expound a thesis, but please not associate me with the term ual federalism" as some writers e that term. "Dual federalism" hit peak in the *Dred Scott* case. If I ve a consistent theme in my atti-le toward federalism, it is that we njoy Jeffersonian rights and berties in a world projected by lexander Hamilton and the James adison of the Constitution (none the other Madisons), to whom I back for my understanding of deralism.

Court history records that you ve served in many courts of ap-eals outside the Fifth Circuit. nce procedures vary from circuit circuit, did you observe some at you felt should be adopted nationally or at least recommended to other circuits?

Well, I have a hard time answering that question. The screening process in the Fifth and the Eleventh Circuits, by which 50 percent or more of the cases are disposed of without oral argument, is a good system for disposing of frivolous and semifrivolous cases and the many cases which are just not worth argument. It saves the litigant money, too. It saves the expense of a lawyer coming all the way, say, from El Paso to New Orleans. And it saves court time. An effective general staff of law clerks, headed by a competent chief counsel, is indispensable to making screening workable.

I like the First Circuit system of not having rebuttal in their oral argument. That is a general rule. The court will allow rebuttal if the appellant's lawyer is taken by surprise. But generally speaking there is no rebuttal in the First Circuit. I find a rebuttal is just a rehash of the original argument, or, what is worse, the appellant's rebuttal brings up a point not previously raised. And I like the system in the Seventh Circuit of rotating judges. Ideally, there should be argument in all cases, but what is attainable or almost attainable in the Second Circuit is not possible in the Fifth, the Ninth, and Eleventh Circuits.

How do I come out? I come out with the view that we should let each circuit work out rules suitable for its circuit.

We are not ready to nationalize yet?

No, we are not ready to nationalize all procedures, especially our argument procedures.

Regarding the nomination and appointment of federal judges: Are you satisfied that we have the best system for putting a judge on the federal bench? What characteristics should be stressed for a judgeship?

That is a very, very difficult question. I am satisfied that the best system for performing our federalizing function is one that removes a judge as far as possible from the regional or local pressures we would get if judges were elected. That means life tenure. California has shown that even a long term and a vote on retention of office threatens the independence of judges. Even if some appointees are subject to criticism because of legal, political, or economic bias, there is a short—to the point of nonexistence—statute of limitations that runs on the obligations supposedly generated by that bias.

"There is no substitute for judicial independence."

There is no substitute for judicial independence. A judge's performance on the bench is something that is not as predictable as laymen might think. Oliver Wendell Holmes, for example, surprised Theodore Roosevelt. It is a good thing to have courts of highly individualistic judges holding strong views. It is a good thing to have on the same court judges who differ widely in their views.

"I feel very strongly . . . that the primary function of federal courts is to protect federally guaranteed and federally created rights."

Do you believe the Senate (especially the Senate Judiciary Committee) process is handled well?

It certainly is an essential part of our system, and I approve of such a high-level committee. The committee takes a responsible attitude. There is necessarily a certain amount of politics in any senatorial committee, but it is fair to say that the Judiciary Committee has taken a responsible attitude towards its constitu-

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tional duties to the nation. Perhaps it has been a little too tough on some nominees, but not too tough on aspiring nominees generally.

Is it valuable to have the ABA's involvement in the process, including their ratings?

I strongly approved the ABA's involvement. The ABA has a member of the selection committee from each of the circuits. Every single Fifth Circuit representative I have talked with over the years, and I have talked with a great many, was a lawyer of experience and integrity. And often they do not represent "the Establishment."

One cannot predict with any degree of certainty how judges will perform on the bench. I repeat myself, but I wish to emphasize that there is not necessarily a correlation between a judge's performance on the bench and his background or supposed bias. A judge's ability, knowledge, maturity of judgment, and compassion all improve with exposure to the realities of life which unfold in the cases he hears. It did in my case—I think.

If you could make procedural or other changes in the federal court system, what are some of the things you would put high on your list?

I feel that the federal system is healthy now and is in good shape except for the fact that it is overloaded. The highest priority for our courts is the reduction of that load by a comprehensive new statute redefining and narrowing our jurisdiction, certainly including the elimination of diversity jurisdiction.

Could one of your reasons be that you feel that the size of the system dilutes the importance of the federal judiciary?

Yes, that is true, but it is of lesser significance than other reasons.

"A judge's ability, knowledge, maturity of judgment, and compassion all improve with exposure to the realities of life which unfold in the cases he hears."

There is no doubt that the importance of our decisions is being diluted by inconsequential cases. A Social Security case, for example, which means so much to each individual—perhaps the difference between a tolerable and an intolerable existence—in terms of the overall functioning of the federal court system is not meaningful.

Today in the district courts and the courts of appeals, there are about 1,000 federal judges (including the senior judges who continue to serve). Are you saying that we have too many judges because we have too many cases?

We have too many judges. I would rather see our federal jurisdiction cut down and the number of judges held within more reasonable limits. Judges would improve in quality and their opinions would then engender more respect.

What is the biggest change you have observed in the federal court system during your career?

Probably the practice of law. The size of law firms has increased enormously. That means that the individual lawyer is not as much of a generalist as he used to be. He tends to be more of a skilled specialist. I do not really like that. The whole business of research has changed since I used to have to pull down volume after volume of the *Digest* to search for the law. Now you punch a button in LEXIS or WESTLAW and out comes a printout with all the cases. The quality of lawyer, however, is better today than I have ever seen it before. These young lawyers, especially our law clerks, are just about as bright as they can be. They are becoming good lawyers and, speaking generally, law schools are turning out better lawyers—at all law schools. The top student at a relatively minor law school might have done as well at one of the so-called major law schools. Better lawyers

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deposited to special funds in the Treasury, where they will act as an offset against the courts' regular appropriations. (The Bankruptcy Judgeship Act provides that effective Nov. 27, 1986, the increase in the bankruptcy filing fee will be set aside for the U.S. trustee program.)

AO, FJC, and court security. The AO appropriation of $29,500,000 is $1,556,000 above the sum appropriated in FY 1986, although $2,600,000 less than the amount requested. The increased funding provides for an additional 17 positions authorized by Congress. Congress appropriated $9,600,000 to the FJC for FY 1987, an increase of $413,000 over the amount that was available to the Center in FY 1986 after the reduction resulting from Gramm–Rudman–Hollings.

The budget also provides $36,000,000 for court security, which will provide 226 additional contract security officers to be phased in during the year, for a total of 1,114 officers by the end of FY 1987.

Need for future appropriations. Recent legislation authorizes 52 new bankruptcy judgeships and establishes a pilot bankruptcy administrator program in Alabama and North Carolina. However, no money to fund these judgeships has yet been appropriated by Congress. Requests for supplemental funds and staff to support this legislation have been prepared and will be forwarded to Congress shortly, as will a Judicial Conference-approved supplemental request for 400 deputy clerks to handle a generally increasing bankruptcy filing workload.

The 3 percent cost-of-living increase to become effective in January 1987 is to be funded by means of a supplemental appropriation. That supplemental is also to pay for the cost of funding the new Federal Employees Retirement System. ■

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mean better judges. We have on the whole a very superior group of judges on the federal bench, at all levels.

How do you stand on state–federal court relations?

I have a very strong feeling that there is a better rapport between federal and state judges now than ever before. That is an extremely healthy thing. It is taking place all over the country. Of course, we do not have the problems in the '80s that we had in the '60s. You see it in law review articles commenting on the liberalism shown by the state courts. Justice Brennan has an interesting article on the subject, for example, and there are other articles. It is certainly apparent to anybody who has been on the court very long. Just now I am in between two halves of my professional life. I practiced law for 29 years and I have been on the court for 29 years. So I am right in the middle, but on the court long enough to see this happen. I am very happy about this development. ■

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DRUGS, from page 1

Assistance for a pilot program on prison capacity.

• Establishes mandatory minimum sentences for various crimes and authorizes courts, upon the prosecution's motion, to impose less than a minimum mandatory sentence if a defendant provides substantial assistance in the investigation or prosecution of another person for a narcotics offense.

• Adds serious drug offenses to those triggering mandatory minimum sentences under the "armed career criminal" provisions of the 1984 Omnibus Crime Control Act (P.L. 98-473).

Budget consequences of new omnibus drug enforcement legislation for the courts. The new drug enforcement legislation necessitated the appropriation of additional funds to the courts in connection with an anticipated increase in drug-related cases. Thus, a supplemental appropriation of $37.5 million provided funds to the judiciary for contractual services and expenses related to the supervision of federal drug- and alcohol-dependent offenders ($12 million), for anticipated increases in demand for representation under the Criminal Justice Act ($18 million), and for the anticipated increased juror usage ($7.5 million).

AO Director L. Ralph Mecham had estimated that the drug enforcement legislation would have a "substantial impact on the criminal caseload of the federal courts at both the trial and appellate levels," and that in FY 1987 an extra 4,000 criminal cases, involving more than 8,000 defendants, would result from the legislation.

The projected increased drug-related caseload will require the submission of an additional budget request to provide for 326 probation and pretrial services officers and supporting staff, and 60 additional deputy clerks. ■

Positions Available

Assistant Circuit Executive, U.S. Court of Appeals for the 9th Cir. Salary $31,619–44,430. Requires minimum 3 years' court management experience; education and experience in budgeting, finance, cost control; legal education helpful. Open until position filled. Apply to Circuit Executive, U.S. Court of Appeals, Box 42068, San Francisco, CA 94142-2068.

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Pre-Argument Conference Attorney, U.S. Court of Appeals for 6th Cir. Salary $31,619–41,105. Minimum 3 years' litigation experience or in position involving structured conflict. Send resume by Dec. 8 to Robert W. Rack, Jr., Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit, Rm. 527, U.S. Post Office & Courthouse Bldg., Cincinnati, OH 45202.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 3

of Justice to investigate and prosecute claims of employment discrimination. Sanctions, including fines and granting of back pay, may be imposed against offending employers. The legislation expands the coverage of title VII of the Civil Rights Act of 1964 to include claims of employment discrimination based upon citizenship, and such claims may be made against employers of as few as four persons. Senator Orrin Hatch (R-Utah), who opposed the bill, predicted that these provisions "will bring about a tidal wave of litigation that the employers and that the courts can ill afford." ■

THE SOURCE

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Carliner, David. "The Role of the Courts in Immigration Law." 25 *Judges' Journal* 13 (Spring 1986).

Caron, Wilfred R. "Federal Judicial Power: The Constitutionality of Legislative Encroachment." 34 *DePaul L. Rev.* 663 (1985).

Casto, William R. "The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations." 18 *Connecticut L. Rev.* 467 (1986).

Elliott, E. Donald. "Managerial Judging and the Evolution of Procedure." 53 *University of Chicago L. Rev.* 306 (1986).

Hazard, Geoffrey C., Jr. "Principles in Legislation." 41 *Record of the Association of the Bar of the City of New York* 685 (1986).

House, Calvin. "Preclusion by State Judgment in Cases Involving Exclusive Federal Jurisdiction." 13 *Western State University L. Rev.* 435 (1986).

Kammen, Michael. *A Machine That Would Go of Itself—The Constitution in American Culture.* Knopf, 1986.

Kilgarlin, William W., and Scott A. Ozmun. "Contempt of Court in Texas—What You Shouldn't Say to the Judge." 38 *Baylor L. Rev.* 291 (1986).

Knight, B. B., and S. T. Early, Jr. *Prisoners' Rights in America.* Nelson-Hall Publishers, 1986.

Meese, Edwin, III. Remarks at the University of Richmond, Constitution Day, Sept. 17, 1986.

Weinstein, Jack B. "Adverse Effect of Budget Cuts on Justice in the Federal Courts." ABA Panel on Gramm–Rudman–Hollings, Annual Meeting, New York, Aug. 10, 1986.

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Administrative Conference Chairman Discusses Negotiated Rulemaking, ADR at Agency Level

Marshall J. Breger, Chairman of the Administrative Conference of the United States, received B.A., M.A., and J.D. degrees from the University of Pennsylvania, and a B. Phil. degree from Oxford University. He served President Reagan as Special Assistant to the President for Public Liaison in 1984–85. He is on leave from the faculty at New York Law School.

What is the role of the Administrative Conference and what is its relationship to the federal judiciary? Judges Stephen Breyer and Carl McGowan act as liaison between the Judicial Conference and the Administrative Conference, but how do the two conferences interact?

The Administrative Conference is a permanent federal advisory agency that provides advice and assistance to Congress, federal agencies, the President, and the Judicial Conference on improvements in the administrative process.

It certainly is beneficial to the Administrative Conference to have liaison representation from the Judicial Conference. For one thing, the Administrative Conference is statutorily empowered to make recommendations to the Judicial Conference on

Marshall J. Breger

matters of judicial review. So, we are delighted that the federal judiciary has traditionally had a lively interest in Conference activities. The late Judge E. Barrett Prettyman chaired the 1962 Temporary Conference and was probably the moving spirit behind the creation of the Conference as a permanent body. The late Judge Harold Leventhal served with great effectiveness as liaison member. Judge Breyer and Judge McGowan, the present liaison members, are both recognized experts in administrative law and take their liaison duties very seriously. Judge McGowan, in fact, devoted an excellent lecture to the work of the Conference.

It is important for us to have this kind of participation from the judiciary because what we do, at least what we recommend, may directly affect the judiciary. If we recommend that a certain administrative action

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1987 Summer Program for Judges on Constitutional Adjudication

The Federal Judicial Center will hold a special seminar for district and appellate judges, June 14–19, at the School of Law (Boalt Hall) of the University of California at Berkeley. Like the Center's 1986 summer program, also held at Berkeley, the 1987 seminar will treat selected constitutional questions on the federal court dockets in the 1980s. In light of the constitutional bicentennial celebration, special attention will be given to historical origins and evolution of constitutional doctrine.

District and appellate judges wishing to attend the seminar should write to Russell Wheeler, Director of the Center's Division of Special Educational Services. To ensure consideration, letters should be received by Feb. 9.

Chief Justice Appoints Noel J. Augustyn Administrative Ass't

The Chief Justice has appointed Noel J. Augustyn as his administrative assistant, effective Jan. 5, 1987. Mr. Augustyn has since 1983 been associate executive director of the Association of American Law Schools. He is a graduate of Dartmouth College (A.B.), Stanford University (M.A.), and the University of Notre Dame Law School (J.D.). He has been an adjunct professor at Georgetown University Law Center since 1985, was assistant dean and assistant professor at Boston College Law School from 1980 to 1983, and from 1974 to 1980 practiced law with two Massachusetts-based firms. His articles on criminal law, evidence, and other subjects have been published in various legal periodicals.

Noel Augustyn

The position of administrative assistant to the Chief Justice was created by Congress in 1972, and is codified at 28 U.S.C. § 677. ■

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Three Judicial Conference Committee Chairmen, New Committee Appointed by Chief Justice

Chief Justice Rehnquist has named three new Judicial Conference committee chairmen and has appointed an ad hoc committee to review and evaluate the work of the Conference and the adequacy of its current committee structure.

Judge Morey L. Sear (E.D. La.), who had been chairman of the Advisory Committee on Bankruptcy Rules, is the new chairman of the Conference's Committee on the Administration of the Bankruptcy System. District Judge Lloyd D. George (D. Nev.), who in 1979 became the first bankruptcy judge to serve on the Center's Board, has been selected to succeed Judge Sear as chairman of the Advisory Committee on Bankruptcy Rules.

Judge Joseph F. Weis, Jr. (3rd Cir.), a member of the Conference's Advisory Committee on Civil Rules, has been named chairman of that committee.

The Judicial Conference authorized the Chief Justice to appoint the ad hoc committee to take a fresh look at the way in which the Conference operates and to evaluate the adequacy of the Conference's committee structure. The Chief Justice noted that the last time such a committee sat was in 1968, and that it was time for another look at the subject. A similar review of the Conference's committee structure was also performed in 1955. ■

Hearing Set on Proposed Fed. R. Crim. P. 12.3

The Judicial Conference Committee on Rules of Practice and Procedure has circulated a preliminary draft of a proposed Fed. R. Crim. P. 12.3, which would require a defendant to give notice of an intent to raise a public authority defense. A hearing on the rule will be held Feb. 13 at 9:00 a.m. at the National Courts Building in Washington, D.C. Those wishing to testify should contact the Committee's secretary, James E. Macklin, Jr., 30 days before the hearing by writing the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Administrative Office of the U.S. Courts, Washington, DC 20544. Those with comments or suggestions should submit them to the same address by Mar. 30. ■

200 Years Ago...

January 1787: Finding how to pay the immense War debt plagued the country long after Yorktown and presaged the struggle over the Constitution. Congress dependent on voluntary contributions from the states, wanted a change in the Articles of Confederation to let it collect a 5 percent impost on imported goods. Unanimous consent of the states was necessary, and by January, all had agreed but New York, where Governor Clinton's supporters controlled the Assembly and opposed the increase in national power. "We are told," argued impost proponent Alexander Hamilton, "that it is dangerous to entrust power anywhere, that power is liable to abuse.... Power must be granted or a civil society cannot exist the possibility of abuse is no argument against the thing; this possibility is incident to every species of power however placed or modified."

Clinton's forces voted down the change without even replying to Hamilton. Shortly thereafter, however, enough Clinton supporters sided with Hamilton to pass a recommendation that Congress endorse the Annapolis Convention's call the previous October for a constitutional convention to be held in Philadelphia later that year.

BICENTENNIAL OF THE U.S. CONSTITUTION

Chief Justice Approves New Guidelines On Intercircuit Assignment of Judges

Intercircuit assignment of senior judges will be permitted more readily than in the past under new guidelines recently approved by the Chief Justice. Under the guidelines, a circuit that lends active judges may not borrow from another circuit and a circuit that borrows active judges may not lend, except in emergency situations. However, this "lender/borrower rule" may now be relaxed in appropriate cases with respect to senior judges, provided the chief judge of the lending circuit is consulted to assure that circuit's needs are met first.

Among other changes to the guidelines, a visiting judge may, if deemed necessary, be accompanied by up to two staff members.

Assignment of U.S. judges to courts in other circuits or to special courts is pursuant to statutory authority. The Judicial Conference appointed the Committee on Intercircuit Assignments to assist and advise the Chief Justice in making these assignments. The changes in the guidelines followed consideration by the Chief Justice, Judge Thomas A. Flannery (D.D.C.), Chairman of the Committee on Intercircuit Assignments, and L. Ralph Mecham, Director of the AO. ■

THE THIRD BRANCH

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New Reporter of Decisions Named at Supreme Court

The Supreme Court of the United States has selected Frank D. Wagner as the new reporter of decisions. Wagner is a graduate of Cornell University and Dickinson School of Law. He has worked in legal publishing since 1972, when he joined Lawyers Co-operative Publishing Co. as an associate editor. Among other assignments, he served there as managing editor of *U.S. Supreme Court Reports: Lawyers' Edition*. Wagner joined Research Institute of America, a subsidiary of Lawyers Co-op, in 1982 as a senior editor, before becoming managing editor in 1985.

State-Federal Judicial Councils Active in Minn., Ore., W. Va.

State–federal judicial council meetings were recently held in Minnesota and Oregon, and the judiciary in West Virginia have met to reorganize their council.

Eight U.S. district court judges joined Chief Justice Douglas K. Amdahl and six other members of the Minnesota Supreme Court in St. Paul for the first meeting of that state's state–federal council in two years. At the time of the meeting, the U.S. district court for Minnesota was studying the Minnesota State Rules of Professional Conduct. The district court has now elected to adopt those state rules, although they will not become effective in the federal court until after publication requirements have been met. The council also discussed attorney discipline and related sanctions.

Chief Justice Edwin J. Peterson (Or. Sup. Ct.) chaired the fall 1986 meeting of Oregon's state–federal judicial council. The council discussed asbestos cases and the merits of certifying a statute of limitations ques-

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Brookings Institution Colloquium Examines Relationship Between Judiciary and Congress

A day-long colloquium at the Brookings Institution in November, under the cosponsorship of the Judicial Conference Committee on the Judicial Branch, was described by its organizers as the first attempt to analyze systematically and to improve the relationship between the judicial and congressional branches.

Judge Frank M. Coffin (1st Cir.), chairman of the Committee on the Judicial Branch, has directed the effort to study and improve congressional–judicial relations. Last year, in an article in the *Brookings Review*, Judge Coffin wrote that the interrelation between Congress and the judiciary has been largely unexplored, and that the condition of the relationship, "if not an acute crisis, is that of a chronic, debilitating fever."

In his introductory remarks at the conference, Judge Coffin said he hoped the session would remove misperceptions about Congress and the judiciary and begin an agenda for practical implementation of measures to improve the relationship between the branches.

Judge Coffin's observations about congressional–judicial relations were confirmed by most of the conference participants. Judge Abner J. Mikva (D.C. Cir.) said, "It is apparent that each group is totally unaware of the internal processes of the other." Judge Mikva, like Judge Coffin, is a former member of Congress.

Much of the discussion focused on the impact that legislation has on the work of the courts and on the role of the judiciary in giving meaning to the law. This prompted a lively exchange between Justice Antonin Scalia and Judge Stephen Breyer (1st Cir.) on the value of legislative history in interpreting ambiguously worded statutes.

A. Leo Levin, FJC Director, chaired a panel on judicial and legislative capacity that included Justice Scalia, Judge Breyer, and Rep. Robert W. Kastenmeier, who heads the House subcommittee that has jurisdiction over the federal courts. L. Ralph Mecham, AO Director, was a member of a panel chaired by Judge Coffin that discussed improvements in congressional–judicial relations, and that also included Emory M. Sneeden, a former Fourth Circuit judge. Judge Mikva, Judge Kenneth Starr (D.C. Cir.), and Judge Irving Hill (C.D. Cal.) were members of the panel on constitutional and prudential concerns. ■

Bicentennial Commission Extended Through 1991; Other Groups Continue To Plan Projects

The 99th Congress has extended the life of the Commission on the Bicentennial of the United States Constitution so that it can coordinate the celebration of the 200th anniversary of the writing and ratification of the Bill of Rights in 1991. The commission had originally been empowered to act through 1989, but its life has been extended through Dec. 31, 1991.

The commission has approved a mechanism for providing $3.7 million in funding for material and instruction on the Constitution for elementary and secondary teachers, and has approved the expenditure of $250,000 for the publication and distribution of nearly 2.5 million pocket-sized Constitutions.

Other bicentennial activities include the following:

- Chief Judge Howard T. Markey, Chairman of the Judicial Conference

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should be reviewable under a particular standard, we need the perspective of judges who would have the reviewing responsibility. Many practical issues could easily be ignored were the judiciary not there to put them in focus for us. Of course, this is a "one-way liaison." We don't have a complementary liaison with the Judicial Conference to let them know how what they do will affect the agencies. I sometimes think the judges, when they want to get rid of litigation in the federal courts, aren't always aware that they may be pushing it onto the agencies and building up agency adjudicative caseloads. But Judges Breyer and McGowan have been very, very helpful.

I should mention that we have developed a formal relationship with two more judges. Judge Stanley Sporkin of the District of Columbia and Judge John Walker of the Southern District of New York have both become special counsel to the Administrative Conference, and they will be helping us in developing projects in one of our "theme areas," the regulation of banking and other financial services.

What is your budget at the Administrative Conference? How many employees do you have?

Our fiscal 1987 budget is about $1.5 million. We have 20 employees, including 9 attorneys.

Is that adequate?

I suppose I would not be a proper agency chairman if I didn't say that we could always use more but, at the same time, I would not be doing my job if I did not say that we are managing well with what we have.

I think to some extent the kinds of activities that we do are dependent upon our budget. We have in the past done extensive full-scale studies of IRS procedures—seven big volumes. These took up the time of much of the office personnel.

When were these studies done?

This was in the mid seventies. Congress requested that we do them, and the IRS changed innumerable procedures as a result. Some say that we should do another IRS study, but I leave that to Congress. We did a major empirical study of the FTC's rulemaking procedure. Empirical studies take vast resources. If you don't have those resources, you have to shy away from empirical research.

Let me emphasize that in addition to the permanent staff of the Conference we hire numerous contract researchers. At any time we have approximately 30 consultants under contract. A large number of the best academics in administrative law have at one time or another been consultants for us. They do the bulk of the empirical studies that result in Conference recommendations. Indeed, most of the work on the IRS and FTC projects was performed under such contracts.

Our consultants are usually professors, but on occasion we hire attorneys in private practice who have specialized skills.

We have begun—and with some success—to get pro bono assistance from law firms. We have just completed a very successful project that was performed for us by Crowell & Moring, a very large Washington, D.C., firm. I am trying to point out to people that the federal government can be an object of charity.

Of course, we have the Conference itself, which is an unusual entity: a council of 10 appointed by the President. James C. Miller, head of OMB, is on it; Arnold Burns, Deputy Attorney General, from the Justice Department; Dan Oliver, Chairman of the Federal Trade Commission; Mark Fowler, Chairman of the Federal Communications Commission; a conference with 44 government members (usually the general counsel or agency head) and some 36 members from the public; and liaison members, including liaison members from the FJC and the AO.

Please give us an update on proposals for setting rules on government agencies' hiring outside counsel.

This is an ongoing study. We hope to have a recommendation ready for the June plenary session. The banking agencies, in particular, make extensive use of private counsel. The

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PERSONNEL

Appointments

Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Oct. 21

James R. Spencer, U.S. District Judge, E.D. Va., Oct. 27

Daniel A. Manion, U.S. Circuit Judge, 7th Cir., Oct. 29

Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Nov. 10

Elevations

John J. Gibbons, Chief Judge, 3rd Cir., Jan. 1

Edward C. Reed, Jr., Chief Judge, D. Nev., Oct. 10

Resignation

Arlin M. Adams, U.S. Circuit Judge, 3rd Cir., Jan. 2

Senior Status

Ruggero J. Aldisert, Chief Judge, 3rd Cir., Dec. 31

CALENDAR

Jan. 15–16 Judicial Conference Committee on the Administration of the Bankruptcy System

Jan. 19–20 Judicial Conference Committee on Judicial Ethics

Jan. 20–22 Workshop for Judges of the Ninth Circuit

Jan. 22–23 Judicial Conference Committee on Court Administration

Jan. 22–24 Judicial Conference Committee to Implement the Criminal Justice Act

Jan. 26 Judicial Conference Ad Hoc Committee on Sentencing Guidelines

Jan. 28–30 Judicial Conference Advisory Committee on Codes of Conduct

Jan. 29 Judicial Conference Committee on Rules of Practice and Procedure

Jan. 30–31 Judicial Conference Committee on the Budget

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FDIC spends over $30 million a year hiring private attorneys; the Federal Home Loan Bank Board close to that. They have a unique set of problems in terms of their needs for private counsel, because those needs occur in crisis situations when there is a failing bank. They have developed procedures to give some regularity to their decision making. Most agencies other than the banking agencies operate on an ad hoc basis. We think that it is important that there be an effort to develop some regularity and guidelines in this area.

Do you think the Conference will accept that recommendation?

Well, I have not been Chairman long, but I have been Chairman long enough not to second-guess the members of the Conference.

Do you anticipate objections from agencies that have been using outside counsel?

We have found that many agencies did not realize that sister agencies had the same kinds of problems. This is a situation in which State thought they alone were doing it, Agriculture thought the same. Except for the banking agencies, everyone thought that these were issues unique to them. So there was a sense of relief upon learning that this is being done throughout the government, and a great desire for some regularity in approaching the hiring of outside counsel.

I think that by and large agencies welcome suggestions for improvement that are based on successful experience in other agencies, so I don't think they will resent our addressing the issue, but it is too early to say whether they will accept particular recommendations.

There are some issues that involve important policy questions. Should the hiring, to the extent that it is required, be done by the agencies themselves, or should the decision to hire outside counsel be approved by the Department of Justice?

You have said that "the development of both case law and legal culture has eroded the consensus which undergirded many portions" of the 1946 APA. Would you enlarge on that?

The APA was in large measure a product of a New Deal view of regulation as an apolitical enterprise. The view was that in the agencies there are experts and that they can solve problems with technical expertise. That view has begun to erode. The erosion can be seen very clearly in fights in the Carter administration over the Omnibus Regulatory Reform bill, which started out as procedural reforms, good-government reforms. Then different interest groups started to say, "Well, these good-government reforms will gore my ox"; "I had better oppose section 14"; "I had better oppose section 17"; and this good-government effort just collapsed. It was dead in the water, because the notion that these administrative agencies were just supplying expertise and not making political choices has eroded.

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Positions Available

U.S. Bankruptcy Judges. New positions in D. Md., E.D. Va., W.D.N.C., D.S.C.; existing positions in E.D. Va., M.D.N.C. Note: Appointments cannot be made to new positions until funds are appropriated by Congress. Applicants must complete comprehensive questionnaire. Apply by Jan. 16 to Samuel W. Phillips, Circuit Executive, U.S. Court of Appeals, 4th Circuit, P.O. Box 6G, Richmond, VA 23214.

* * *

U.S. Bankruptcy Judges. E.D. La., W.D. La., N.D. Tex., W.D. Tex., S.D. Tex. (Houston, 3 positions; Corpus Christi, 1 position). Salary $70,500. Requires law degree and requisite character, experience, and ability. For qualification standards and application form, write Lydia Comberrel, Circuit Executive, U.S. Court of Appeals, 5th Circuit, 600 Camp St., New Orleans, LA 70130. Cut-off for completed applications is Feb. 18.

EQUAL OPPORTUNITY EMPLOYERS

Series of Regional Hearings Completed

Judicial representatives from five judicial circuits were among the more than 30 witnesses who testified before the U.S. Sentencing Commission in Washington last month. That two-day session was the last in a series of regional hearings that followed the publication of the Commission's preliminary draft sentencing guidelines on Oct. 1, 1986. Previous hearings were held in Chicago, New York City, Atlanta, Denver, and San Francisco. In all, the commission has received oral and written commentary

NEWS FROM THE SENTENCING COMMISSION

from hundreds of individuals and groups concerning the preliminary guidelines.

At the conclusion of the hearings, Sentencing Commission Chairman William W. Wilkins, Jr., said he was pleased that the hearings had accomplished their objective. "The preliminary draft and regional hearings focused attention on the many difficult issues the commission must face as it seeks to develop theoretically sound and workable guidelines," Judge Wilkins said. "I am encouraged by the strong support and also the constructive criticism offered by those interested in improving our criminal justice system."

The commission will consider the commentary received in preparing a redraft of the sentencing guidelines for publication in late January, on which it will again solicit public comment. As was the case with the preliminary draft, copies will be sent to every Article III judge, U.S. magistrate, U.S. attorney, chief U.S. probation officer (with several copies to each probation office), federal public defender, and hundreds of defense attorneys and interested organizations and individuals who received the first draft. ■

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Secondly, there is now, unlike in 1946, a great deal of uncertainty about the desirability of regulation itself. During the New Deal, during World War II, the regulatory state was a "given"; in fact, it was a given good; it was always a good. Got a problem? Regulate it. What the Reagan administration has done is lay that basic question—that bottomline, threshold question—open to reexamination. And clearly most of us would now agree that it is less than 100 percent certain that regulation is always an unmitigated good.

Thirdly, the APA, the whole regulatory apparatus of 1946, was largely an adjudication apparatus, an enterprise to dispose of particular matters under general guidelines laid down by the legislative branch. What we have seen over the last 40 years is the growth of regulation through rulemaking, of policy making through rulemaking, and this growth in rulemaking really reflects a devolvement of policy-making power to agencies in the regulatory state—a very different problem from the 1946 paradigm, within which you added to agency size and responsibility to enlarge the ambit for adjudication.

The Administrative Conference's Committee on Administration recently issued a proposed recommendation on agencies' use of alternative dispute resolution techniques. Would you comment on this proposal?

Well, Recommendation 86–3 is one we are very excited about, and it is a major theme of the Conference. We think that there is really ferment in the area of ADR. In recent years most of that ferment has been in the judiciary. Indeed, if you look at FJC publications you can track a lot of the experimentation that has been going on: in arbitration, in minitrials, in pilot mediation programs. Hardly anything has happened in the agencies. The agencies—and I always feel embarrassed saying this to the judges—the agencies must have 20 to 50 times the number of adjudications that the court system does. And there are so many more "judges"—administrative law judges, hearing examiners—so if you can have ADR in the agencies you have accomplished tremendous efficiency, tremendous savings of time and energy, and more justice (because I believe that delay in and of itself is a reduction in justice). So we are pushing this very hard.

Marshall J. Breger

We are going to have a major conference in the spring on ADR at the agency level. We have some projects that we discussed at our plenary sessions in June and December 1986. Some of these projects, in fact, discuss whether or not current statutes or procedures will have to be modified. We are going to look at whether there is a need for change in the Federal Advisory Committee Act. For example, when you want to have a regulatory negotiation on rulemaking, is the caucusing that often occurs in those meetings always required to be open to the public under FACA? We don't think it is, but a lot of agencies are afraid. If they really are so afraid, would a change in the statute encourage them to experiment with regulatory negotiation?

We are considering the problem of the power of an agency to use a private arbitrator, and we have just issued some suggestions as to how agencies can go about acquiring the services of such "neutrals." We are looking at the question of settlement, the Comptroller General's rules regarding settlement authority, the fact that settlements have to be approved by the Department of Justice. That affects the settlement process. We are pushing both the alternate dispute resolution area and what we call "regulatory negotiation," which is a form of ADR, an effort to bring parties together in a negotiation before a regulation is issued in a rulemaking, in the hope that this will prevent litigation afterwards. And since 90 percent of the EPA regulations, for example, end up in court, if you can get a consensus beforehand you have prevented a tremendous waste of everyone's time and energy and money.

Where does the proposal for an independent agency to hear Freedom of Information Act disputes stand?

The Judicial Review Committee of the Administrative Conference did not agree with the proposed recommendation and sent it back to the consultant for this reason: There are 5,000 agency denials of FOIA requests a year; only 500 go to courts. There is no point in setting up an independent tribunal for 500 cases. What the committee did want to explore is whether or not the ombudsman notion for FOIA problems—which exists in New York State, in Australia, in New Zealand, and in Canada—would be useful in cutting down on the time of the FOIA case, preventing litigation, and that is what I am exploring.

Has the Administrative Conference taken a stand on the value of the Equal Access to Justice Act?

Yes. We were directed by Congress to consult with agencies on implementation of the EAJA and to assist them. We prepare model rules for the agencies, and we prepare a yearly report on EAJA agency adjudications. We get hundreds of ad hoc questions from both the small and large agencies. And we have a kind of substantial presence as an informal guardian of the EAJA. We consulted with Congress a number of times on the modi-

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ied act, and we prepared new model ules of procedures under the modified act.

As far as we can see the act has een all for the good. We have not een the dangerous effects its opponents swore would happen. The eavens have not fallen. The public sc is not rent (at least not by this act) nd people or small businesses who ave law suits with the federal government—businesses where they ere in the right, where the government was not substantially justified—have been recompensed, including attorney expenses. So we ink the changes are for the good. lere I must add a *mea culpa:* While in ne White House, I supported the resident's veto of the proposed AJA amendments [Breger, *How hould the Equal Access to Justice Act be ebuilt?*, 71 A.B.A. J. 40 (1985)]. The mended act as finally passed has roven most successful, however.

The Administrative Conference everal years ago made a recommendation intended to deal with "races the courthouse" in cases involving ultiparty forum shopping for judial review of administrative action, ut the races continue. Would you mment, please?

I have been working very hard ith Congress to enact the "Races to e Courthouse" bill, which creates independent body to randomly elect the court with venue in such tuations. We proposed this in 1980, nd it was included in a number of mnibus regulatory reform bills. For ne reason or another, these bills ever became law. In the 98th Congress we worked with the Judicial onference, the ABA, and other interested parties to develop a generly satisfactory legislative proposal, nd it was passed by the House as a parate bill, but it didn't get through the Senate. H.R. 439 finally passed the Senate in the closing days of the 99th Congress. Sen. Charles E. Grassley (R–Iowa) was very supportive of it. It passed encumbered by a number of unrelated amendments concerning, among other things, judicial pay. Due to lack of time, the amended bill never made it to conference. Having reread Aesop's fable of the tortoise and the hare, I intend to try again this spring in the 100th Congress.

"I have been working very hard with Congress to enact the 'Races to the Courthouse' bill."

It is important for your readers to understand what a race to the courthouse is all about. It is a situation where two adverse law firms can hire people to wait—to camp out in front of the clerk's office at a federal court or at an administrative agency—and keep open phones to New York and to New Orleans, for example, for weeks on end. They hire people at the other end of the phone booth to form a human chain in order, hopefully, to file an already written appeal with the clerk of a circuit court that is more favorable than another circuit court. But tremendous problems develop on the timing, because the Second Circuit uses a second hand and the Fifth Circuit does not. And in an actual case where both the Second and Fifth Circuits showed a filing at 3:01 p.m., the circuit court had to send it back to the agency to figure out who won the race.

"[N]egotiated rulemaking can change the face of rulemaking as you know it today."

Are you studying the so-called nonacquiescence problem, where some agencies refuse to follow one or more circuits' decisions when administering a national program?

This problem of nonacquiescence is a significant one, and it is one on which we have commissioned a study. We will review the nonacquiescence policies of all relevant federal agencies, not only the Social Security Administration. We hope that this study will be completed by the end of 1987.

Does the judiciary sometimes go too far in reviewing the factual basis of regulations, particularly in complex scientific areas?

On the narrow point of complex scientific facts, we don't think there has been that big a problem. Our *Guide to Federal Agency Rulemaking* points out that, especially when the subject matter of the rule is a technical one, judicial second-guessing is likely to be minimal. And I think that has been generally the case with technically complex facts. There is no doubt that there has been a shift in the attitude of the federal courts in the seventies. You had the "hard look doctrine" developed by Judge Skelly Wright, and now you have the *Chevron* doctrine of the Supreme Court, faithfully applied in the D.C. Circuit by Judge Kenneth Starr, for example, in *Investment Co. Inst. v. Conover*, No. 85–5029. *Chevron* points out that where the legislative history is clear, you have to follow the legislative history. Where the legislative history or the legislative directive may be uncertain, the courts should give deference to the agency. And the *Chevron* position, I think, would make clear that this would not be a major doctrinal problem.

Do you file amicus briefs?

Some people have suggested that the Administrative Conference should file amicus briefs, but we have never done so up to now. We may well have the legal power to file them, but doing so would only rarely advance our approach to administrative law reform—which is to create consensus for reform among impacted parties. I think we have seen our role as patiently building a con-

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sensus among the agencies and within the executive branch—a consensus that leads to improvements in agency rules and regulations. We are often consulted by the Justice Department on appeals. The Solicitor General's office consults us on matters where we have unusual expertise. And our reports and recommendations are public and are frequently cited in briefs and in judicial decisions. So I am not convinced we should jump into the amicus area unless the need is pressing and there is no one else ready to fulfill that need.

I believe that the Conference can do better work if it focuses its energies on particular themes rather than picking up projects and functions in an ad hoc manner. I try to gear our studies around a particular number of themes, such as dispute resolution, financial services, problems of user fees, and government efficiency, where with a definable amount of work we will really be the government experts in that area.

We also continue our traditional work in administrative rulemaking, adjudication, problems of administrative law judges. In 1964 when the Administrative Conference Act was passed, we were faced with the problem of fleshing out the meaning of the APA. As our *Guide to Federal Agency Rulemaking* shows, we did some of the major work in informal rulemaking. We dealt with most of the major issues concerning agency adjudication, such as procedure for discovery, subpoenas, hiring of ALJs, agency review (see our many recommendations in 1 C.F.R. pt. 305 (1986)). Since that time, we did some of the key work in agency openness as evidenced by FACA, by FOIA, by the Sunshine Act (see, e.g., our 1978 *Interpretive Guide to the Government in the Sunshine Act)*, and we developed the arguments for citizen participation in government decision making. Now you have a whole new set of issues, such as alternate dispute resolution, which have developed because of a concern about litigation overload. There are problems of government grants and contracts, the enactment of many user fees, and new substantive areas, such as financial services that are using regulations without a coherent conceptual or structural framework. So the face of administrative law is very different, and the issues, I think, are different and exciting ones.

What changes are needed in rulemaking?

The Conference has done a lot of work in this area. We think that the present APA exemptions that allow agencies to omit notice and comment procedures for rules dealing with public property, loans, grants, benefits, and contracts should be eliminated. Most agencies do provide notice and comment for such rules, in large part as the result of our recommendation. These kinds of rules were small potatoes in 1946. But with the growth of entitlement programs, they are now very big stuff.

We think that agencies often (or at least sometimes) should use additional procedures where they consider complicated or particularly important rules. They should go beyond notice and comment to advance notice of proposed rulemaking, longer periods of time for comment, holding public hearings or conferences. These are just examples. Again, different agencies have employed these procedures with good results. We think agencies should also develop appropriate procedures for handling ex parte communications that occur in rulemaking. The gist of such ex parte comments should be placed in the rulemaking record. An agency should also take care of conflicts of interest by promulgating procedures by which decisional officials involved in rulemaking abstain from participation if they have a conflict of interest or if they have prejudged facts that are in issue. And we think that in major rulemakings a regulatory analysis

See BREGER, page 9

NOTEWORTHY

Second Circuit on summary judgment. The Second Circuit has encouraged litigants to use the summary judgment process, taking note of a study done by its Committee on the Pretrial Phase of Civil Litigation chaired by Professor Maurice Rosenberg. In *Knight v. U.S. Fire Ins. Co.* No.86-7294 (Oct. 22, 1986), Chief Judge Feinberg wrote that some litigants in the circuit were "reluctant to make full use of the summary judgment process because of a perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time.... [From the committee's study] it is evident that grants of summary judgment are upheld on appeal in most cases [in 79 percent of the cases studied by the committee]. That figure is comparable to this circuit's 84 percent affirmance rate for appeals in civil cases generally."

* * *

PACT publishes new directory. A directory of victim–offender reconciliation and mediation programs in the U.S., Canada, and England has again been published by the National Victim–Offender Reconciliation Resource Center, which is a project of the PACT Institute of Justice, a nonprofit corrections organization. The directory lists 47 victim–offender programs that arrange meetings, in the presence of trained mediators, between perpetrators of crimes and their victims. The directory reports types of jurisdictions served, most common offenses referred, funding and referral sources, number of annual cases, and other program characteristics. *Victim–Offender Reconciliation Program Directory* is available, for $4.60 postpaid, from PACT, Box 177, Michigan City, IN 46360. ■

BREGER, from page 8

should be prepared. This is a form of cost-benefit analysis. Agencies should utilize this analysis as a tool. You make better rules by integrating analysis into the rulemaking process from the very beginning.

Last but not least, negotiated rulemaking can change the face of rulemaking as you know it today, and can be very useful in many situations. It is being used by the EPA, by the FAA, the FTC, the Department of Labor, the Department of the Interior; all very usefully with the potential of saving extensive amounts of time and money in litigation. But let me emphasize that agencies need a considerable amount of discretion in deciding whether to use additional procedures in any particular rulemaking. We have been in general reluctant to urge expansion of across-the-board statutory procedural requirements for rulemaking.

Any further comment?

I think that it is important, with all due respect, for the courts to be sensitive to the fact that they are in a partnership with both the adjudicatory and the rulemaking side of the agency activity. I think that the judiciary should become involved in the concerns of the administrative agencies, because so much of what happens there will affect the contours of the federal judiciary in the future. It is my understanding that Social Security disability cases comprise 30 percent of the caseload in many districts. Now that fact alone should focus the judiciary on the importance of understanding and discussing and working in a systemic way toward dealing with problems of agency adjudication mechanisms.

"[I]t is important . . . for the courts to [realize] that they are in a partnership with both the adjudicatory and the rulemaking side of the agency activity."

The presence of Judges Breyer and McGowan has been very helpful to the work of the Conference. We look forward to further interaction with the judiciary—with the Judicial Conference, with the FJC, and with circuit judicial conferences where administrative law issues impact on caseload.

Judicial review of agency rulemaking is significantly affected by the agency rulemaking process. Judicial interest in improving that process could well reduce litigation or at least streamline the issues that are litigated. Courts should recognize the need to articulate their positions on rulemaking clearly and in ways that are sensitive to agency decisional processes. They should support efforts, such as "reg-neg," to reduce the number of final rules that are litigated. Improvements in the law have to include the law in action, and the rulemaking and adjudicatory activities of administrative agencies very often embody the law in action—the underside of the legal iceberg, one might say. In short, any effort the judiciary makes to learn more about these beasts whose rules they review and whose adjudications they oversee will do much to improve the administration of justice for both agencies and courts. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Abramson, Leslie W. *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct*. American Judicature Society, 1986.

Childress, Steven Alan. "'Clearly Erroneous': Judicial Review Over District Judges in the Eighth Circuit and Beyond." 51 *Missouri L. Rev.* 93 (1986).

Federal Court Management Statistics—1986. Administrative Office of the U.S. Courts, 1986.

Federal Offenders in the United States Courts—1984. Administrative Office of the U.S. Courts, 1986.

Goettel, Gerard L. "From the Bench: Appellate Fact Finding—And Other Atrocities." 13 *Litigation* 7 (Fall 1986).

Goldberg, Arthur J. "The Free Exercise of Religion." 20 *Akron L. Rev.* 1 (1986).

Hale, Emmette F., III. "The 'Arising Under' Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law." 14 *Florida State University L. Rev.* 229 (1986).

Hufstedler, Shirley M. "Bad Recipes for Good Cooks—Indigestible Reforms of the Judiciary." 27 *Arizona L. Rev.* 785 (1985).

Hupp, Harry L. "From the Bench: Ten Ways to Torpedo a Settlement Conference." 12 *Litigation* 7 (Summer 1986)

Levine, Murray. "The Role of Special Master in Institutional Reform Litigation: A Case Study." 8 *Law & Policy* 275 (1986).

Meador, Daniel J. "Federal Law in State Supreme Courts." 3 *Constitutional Commentary* 347 (1986).

Mikva, Abner J. "Reading and Writing Statutes." 28 *South Texas L. Rev.* 181 (1986).

O'Connor, Sandra D. "The Changing Role of the Circuit Justice." 17 *University of Toledo L. Rev.* 521 (1986).

Packel, Israel. "Congressional Power to Reduce Personal Jurisdiction Litigation." 59 *Temple L.Q.* 919 (1986).

Starr, Kenneth W. "The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court." 28 *South Texas L. Rev.* 189 (1986).

Steinberg, Robert E. "OMB Review of Environmental Regulations: Limitations on the Courts and Congress." 4 *Yale Law & Policy Rev.* 404 (1986).

Thompson, Robert S. "Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate." 59 *Southern California L. Rev.* 809 (1986).

BICENTENNIAL, from page 3

Committee on the Bicentennial of the Constitution, reports that the committee will be updating the film series *Equal Justice Under Law* and plans to make videocassettes available to all courts. Committee members will judge a law-school essay contest conducted by the national commission. While a number of other projects are under consideration, the committee sees its primary role as catalyst and information exchange center for district and circuit court committees.

• Phi Alpha Delta Law Fraternity, International, has begun a six-year bicentennial program that emphasizes outreach to communities to educate citizens about the Constitution. The program organizes intergenerational discussion groups on the National Council on the Aging's publication *The Family, the Courts and the Constitution*.

• The ABA and the Constitution Study Group of the National Archives have published a collection of essays about the Constitution. *The Blessings of Liberty: Bicentennial Lectures at the National Archives* includes lectures by prominent constitutional scholars and public figures given as part of the Archives' "Bicentennial '87" lecture series. The volume is intended as a resource for persons planning bicentennial programs, and is available from Order Fulfillment–468, ABA, 750 N. Lake Shore Dr., Chicago, IL 60611, for $4.95 plus $1.00 handling; for multiple copy orders, send $2.50 handling charge. Specify Prod. Code No. 468-0005.

• A National Center for the U.S. Constitution, devoted to scholarly study and public education concerning the Constitution, will be established in Philadelphia. A planning committee is headed by Hobart G. Cawood, superintendent of Independence National Historical Park and the director of Philadelphia's bicentennial observance. ■

COUNCILS, from page 3

tion to the Oregon Supreme Court. Chief Justice Peterson reported on judicial immunity. Council members agreed jointly to support proposals in Congress to strengthen judicial immunity, particularly in the area of attorneys' fees in injunction suits. Judge James Burns (D. Or.) asked that the council keep in mind recent filings by disgruntled litigants seeking recusals.

West Virginia plans to organize a new state–federal council and will soon hold regularly scheduled meetings. Conflicts in court calendaring—a problem for both the courts and the bar—will receive early attention. Judges and attorneys see calendaring guidelines—now in draft form—as a solution. For further information about or copies of guidelines for calendaring, contact Alice O'Donnell, FTS 633-6359, 1520 H Street, N.W., Washington, DC 20005. ■

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President's Decision on Salary Increases Falls Short of Commission's Recommendations

President Reagan has recommended increases in salaries for judicial personnel, although his recommendations do not match the increases recommended by the Commission on Executive, Legislative, and Judicial Salaries (see the table on page 4). The President's recommendations will take effect absent contrary action by Congress within 30 days. Under those recommendations, district judges will receive an annual salary of $89,500, circuit judges $95,000, claims court judges $82,500, and bankruptcy judges, magistrates, and Level V executives $72,500. The commission had recommended salaries of $130,000 and $135,000 for district and circuit judges, respectively. The President stated in submitting his recommendations, "This increase is but the first step in addressing the loss of real income documented by the ... Commission," and that he anticipates submitting another salary recommendation prior to leaving office that would be "another step toward overcoming that erosion of real income."

The salary commission made recommendations Dec. 15 concerning the compensation of more than 3,000 government positions, including the Vice President, cabinet officers, members of Congress, Supreme Court justices, and federal judges. "Since 1969, incumbents in these

See SALARIES, page 4

Chief Justice Lends Support to Salary Increases

The Chief Justice utilized his year end statement, released Jan. 1, to underscore his strong support for the recommendations of the Commission on Executive, Legislative, and Judicial Salaries. The statement said in part, "The pay of federal judges has never been comparable to the earnings of lawyers at the top of their profession in private practice, and the recommendations of the Salary Commission do not approach those figures. The Commission's recommendation would simply restore to federal judges the sort of earnings which have always made that office attractive to those who combine a desire for public service with an interest in the judicial process." The Chief Justice cited a statement of Circuit Judge Frank M. Coffin (1st Cir.), who has said that "what no judge appointed to the bench in the past two decades has ever expected to bear was an almost 40 percent reduction in his or her real compensation over the past 18 years."

The Chief Justice pointed out that "sitting judges' inevitable loss of morale, their increasing preoccupation with possible congressional rectification, and the possibility that lawyers will come to see federal judicial service not as a calling but as a stepping stone to a lucrative private practice all threaten the traditions of our inde-

See CHIEF JUSTICE, page 5

Abraham Sofaer, Former Prosecutor and Judge, On the Role of State Department Legal Adviser

Abraham D. Sofaer received his B.A. and an LL.D. degree from Yeshiva University and his LL.B. from New York University. He clerked for Judge Skelly Wright (D.C. Cir.) and for Justice William J. Brennan, Jr., and served as an assistant U.S. attorney for the Southern District of New York (1967–69). He taught law at Columbia University from 1969 to 1979, and was appointed to the U.S. District Court for the Southern District of New York in 1979. He served on the Federal Judicial Center Advisory Committee on Experimentation in the Law. In 1985 he became Legal Adviser to the State Department.

You served as a judge for six years before taking your present position. How would you compare the two jobs?

I think when you leave the bench you can understand the enormous value of having a place where you can have disputes authoritatively resolved. In diplomacy you don't have such a place. It is more difficult. You have to negotiate things out, and there are very few places where you can go for an authoritative resolution. We don't agree, for example, that the International Court of Justice

See SOFAER, page 6

Inside ...

Questions Raised on Administration of Vaccine Injury Act ..... p. 2

Sentencing Commission Revises Guidelines, Seeks Comments ..... p. 5

200 Years Ago...

February 1787: With the country near bankruptcy, Shays's Rebellion ravaging New England, and Congress unable to act, many agreed that some change in the national government was necessary but few agreed about how much.

The five-state commercial convention that had met in September 1786 in Annapolis had suggested that the states appoint delegates to meet in Philadelphia in May 1787 "to devise such further provisions as shall appear ... necessary to render ... the federal government adequate to the exigencies of the Union." On Feb. 21, Congress offered its opinion that such a meeting would be "expedient" but only "for the sole and express purpose of revising the Articles of Confederation."

That same day, Secretary of Foreign Affairs John Jay wrote John Adams that he expected little from the proposed convention. He knew the government "was unequal to the task assigned to it" but was unsure what changes were necessary. "There is one, however, which I think would be much for the better, viz., to distribute the federal sovereignty into its proper departments of Executive, Legislative, and Judicial; for that the Congress should act in these different capacities was, I think, a great mistake in our policy."

BICENTENNIAL OF THE U.S. CONSTITUTION

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

Vaccine Injury Act of 1986, Still Unfunded, May Be Subject of Congressional Scrutiny

A program to provide compensation in cases of injury caused by vaccinations against certain childhood diseases is being studied with an eye toward substantial changes. Due to controversy over some provisions of the program—including the role the judiciary would have in administering it—the 100th Congress may amend the program in the course of enacting an excise tax to provide funding for it. Funding from a source other than general revenue is necessary for the program to become operational.

Judicial Conference committees are considering appropriate recommendations concerning the program, which was established by the National Childhood Vaccine Injury Act of 1986 and signed into law on Nov. 14 as title III of the omnibus health bill (S. 1744). President Reagan said at the time of signing that a "serious deficiency of title III is that it would create a program administered not by the Executive Branch, but by the Federal judiciary. This is an unprecedented arrangement that represents a poor choice to ensure a well-managed and effective program."

Under the program, a claim for compensation would be made by filing a petition with the U.S. district court for the district in which the petitioner resides or in which the injury or death occurred. A copy of the petition would be served upon the Secretary of Health and Human Services. The role of the executive branch in the compensation program is limited to that of "respondent" to such petitions.

Actual administration of the compensation program would be handled by the courts according to the detailed regulation of court proceedings contained in the act. For example, the act requires the appointment of a special master in every compensation case. The special master would take evidence and prepare proposed findings of fact and conclusions of law with respect to whether compensation is to be provided and the amount of any such compensation. The record is then subject to review

See COMPENSATION, page 10

Smithsonian Symposium to Examine Constitution's Origins, Interpretation, and Impact Abroad

Constitutional Roots, Rights, and Responsibilities, the Ninth International Symposium by the Smithsonian Institution, is scheduled for May 18–23, 1987. The symposium will be chaired by A. E. Dick Howard, professor of law at the University of Virginia School of Law.

The symposium will open in Charlottesville, Va. The first day's program will feature sessions on the idea of a written constitution from historical and interpretive perspectives, including such topics as the idea of a written constitution in the thought of the American Founders, change under written constitutions, and judicial review. Participants will travel to Washington, D.C., for the remainder of the symposium.

The second day's program will examine the Old World and New World roots of American constitutionalism. Speakers from England, Scotland, and Germany, as well as American academicians and practitioners, are scheduled to give presentations.

The third day's program will be on the sources and evolution of rights and on their implementation and efficacy. A reception at the White House is planned.

The fourth day will be devoted to citizenship and citizen education and participation. The closing session of the symposium will be on the U.S. Constitution's impact abroad.

For further information, contact Neil Kotler, Office of Smithsonian Symposia and Seminars, (202) 357-2047. ■

Murder of Parole Officer Gahl Remembered as Staff Safety Training Programs Expanded

The murder of U.S. Probation Officer Thomas E. Gahl of the Southern District of Indiana in September 1986 was the most recent incident of serious violence against U.S. probation and pretrial services officers, and dramatized the risks inherent in these court employees' jobs. Michael Wayne Jackson, a former mental patient with a lengthy criminal record, shot Officer Gahl in Indianapolis during a crime spree that stretched across Indiana, Illinois, and Missouri. Gahl's death was the third employee fatality in the history of the probation and pretrial services.

Prior to Officer Gahl's death, the FJC's Management Training Branch had developed an innovative, broad-based, two-day program of staff safety training for U.S. probation officers and pretrial services officers. The program's primary emphasis is on prevention and management of crisis situations, and emergency responses. A videotape that accompanies the program includes dramatizations of potentially dangerous situations to which employees may be exposed. For example, during the "prevention" portion of the program, participants watch a video segment that depicts a staff member returning to her car in a parking garage. The viewers imagine themselves in the same situation and refer to questions in a workbook, which is provided. The questions, and follow-up discussion among the group of trainees, force them to think about pre-planning to avoid potential confrontation, and about such issues as paths of escape; what the options are (such as retreat or taking shelter); and what defensive shields or tactics might be available in the event of attack. Similar segments deal with safety in the office, bomb threats, home visits, and other commonly encountered situations. The program also teaches techniques useful in longer-term officer–client relationships, but which can also be applied to chance encounters with assailants. Several simple holds and escapes are demonstrated and practiced.

The training program includes the use of such techniques as lecturing, role-playing, criticizing of the video segments, group discussion, problem-solving exercises, and feedback and dialogue on methods the participants have found effective in coping with specific situations in both the field and office. The program does not deal with firearms or the use of deadly force.

The program is designed for all levels of probation and pretrial services staff. It is based on research conducted by the Staff Safety Curriculum Planning Committee convened by the FJC, and on the experience of practitioners in the probation system and of criminal justice agencies. The contents and methodology of the program are set forth in the *Staff Safety Instructor's Manual*, which is made available to those who present

See STAFF SAFETY, page 5

AO Starts Program for Distinguished Service

The Administrative Office has begun a program to recognize court employees for distinguished service to the judiciary. Director L. Ralph Mecham said such recognition will be made when merited by an employee whose contributions enhance the operation of the judiciary.

Nancy M. Mayer of the District Court for the District of Columbia is the first employee to be recognized under this program. Ms. Mayer's research into grand jury utilization and development of a grand juror kit have led to better management of grand juries, improvement in grand juror morale, and substantial reduction in costs.

The Judicial Conference has authorized the AO to seek legislation that would permit court employees to receive cash awards under the Incentive Awards Act. Under that act, government employees may be given cash awards for achievements that save the government money or improve government operations. The act does not apply to court employees, however.

Second Drug Aftercare Program Report Issued

The FJC has recently published *The Impact of the Federal Drug Aftercare Program*, by James B. Eaglin of the Center's Research Division.

This report presents the findings of a study of what has happened to offenders under supervision in the drug aftercare program created under the Narcotic Addict Rehabilitation Act of 1966 (18 U.S.C. §§ 4251–4255). The study was undertaken by the FJC as the second part of a two-phase evaluation of the aftercare program. (The first part has been reported by the Center as J. Eaglin, *A Process-Descriptive Study of the Drug Aftercare Program for Drug-Dependent Federal Offenders*, FJC 1984.)

A cohort of approximately 1,000 offenders from seven federal probation offices in New York, Pennsylvania, Maryland, Texas, California, and the District of Columbia was studied from July 1, 1982, to June 30, 1983, so as to produce systematic and up-to-date descriptive data on aftercare program participants and to identify significant factors that help to explain outcomes for those in the program. These outcomes are partially positive (increased employment and, for a majority of those studied, no arrests or parole violations) and partially negative (rearrests and findings of continued drug use for some offenders).

The report is prefaced with a summary of the study's results. It contains sixty-three tables outlining study findings, along with a comparison of the first and second studies.

Copies of this report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (12 oz.), but do not send an envelope.

SALARIES, from page 1

senior government jobs have suffered severe declines in purchasing power," Commission Chairman James L. Ferguson said. The commission's data showed that for the period 1969–86, for example, U.S. district court judges have experienced a percentage loss in real income of 34 percent compared with corporate senior staff attorneys, who have seen a percentage increase in real income of 16 percent.

ABA President Eugene C. Thomas supported the commission's recommendations. "It is neither good government nor prudent management to continue to impose severe financial sacrifices on federal judges," he said. The citizens group Common Cause issued a statement saying that it strongly supports substantial pay increases for members of Congress, high-level executive branch officials, and federal judges "as necessary and in the public's best interest."

The commission noted that the level of congressional salaries has traditionally been "linked" to the levels in the other two branches of government. "The Founding Fathers intended Members of Congress to be equal to the other branches in status, prestige, ability and integrity.... Therefore, we have concluded that parity between Level II [executive branch positions], Congress and judges on the Circuit Court is important and should be maintained. However if Congress is unable to develop the courage to raise its own pay, it is better to limit the unfairness thereby caused and not impose inadequate pay levels on the two other branches," the commission's report said. ■

Excerpt from *High Quality Leadership—Our Government's Most Precious Asset*, the report of the Commission on Executive, Legislative, and Judicial Salaries, Dec. 15, 1986. After noting that the rate of federal judicial resignations has more than doubled since the beginning of the 1970s, due in large part to the level of remuneration, the report continued:

"It is hard to assess the real cost of replacing an experienced federal judge who resigns at the pinnacle of his career, but the implications for the judicial system are severe. It takes fully five years for a qualified attorney, once appointed to the federal bench, to reach peak efficiency. Early departure thus creates a gap in the system which at best cannot be filled for half a decade, but which at worst may result in a permanent diminution in the capabilities of the service.

"As new recruitment at inadequate salaries threatens to bring less qualified men and women to the bench, the real cost cannot be calculated in dollars. The real cost will be in the insidious and longer term drain imposed on the nation's judicial system, a loss we will all feel over time, if not now adequately addressed."

Recommended Salary Increases for U.S. Judicial Personnel

Position	Current Salary*	Recommended Salary	
		President's	Commission's
Chief Justice	$111,700	$115,000	$175,000
Associate Justice	107,200	110,000	165,000
Circuit Judge	85,700	95,000	135,000
District Judge	81,100	89,500	130,000
Claims Court Judge	72,300	82,500	130,000
Bankruptcy Judge	70,500	72,500	120,000
Magistrate	70,500	72,500	110,000
Level V	70,800	72,500	110,000

*As of January 1987, including the recent 3 percent increase.
SOURCE: Administrative Office of the U.S. Courts.

NOTEWORTHY

State prison population increase. The Bureau of Justice Statistics of the Department of Justice reports that the state prison population has increased from 115,314 to 415,796 between 1930 and 1984, with more than two-thirds of that increase occurring after 1975. Because the growth in prison population has been faster than the addition of new prison space, the population density in state prisons increased 45 percent during the period 1979–84.

* * *

State court clerk, deputy clerk not immune from suit. A U.S. district judge has refused to dismiss a complaint against a state court clerk and deputy clerk in a lawsuit charging them with acting in concert with a state court judge and others to deny the plaintiff his constitutional rights. The lawsuit was brought against a bank and its president, a judge in Colorado's District Court for the Sixth Judicial District, the clerk and deputy clerk of that court, and other defendants. *Pitts v. First National Bank*, Civil No. 85-1131-JB (D.N.M., Oct. 21, 1986). The complaint alleged that the clerk and deputy clerk failed to file documents. The complaint against the judge was dismissed, because all his alleged actions were within the scope of his judicial duties. The court refused to dismiss the complaint against the clerk and deputy clerk, however. Under *Henriksen v. Bentley*, 644 F.2d 852 (10th Cir. 1981), clerks are entitled to absolute immunity when performing quasi-judicial duties or acting under explicit instructions from a judge, but when performing ministerial duties, they are usually afforded only "qualified immunity." The court held that the alleged conduct complained of, failing to file documents, "is a ministerial function for which a clerk would be afforded only qualified immunity." ■

CHIEF JUSTICE, from page 1

pendent judiciary. Should the President and Congress fail to make realistic salary adjustments for judges, the present drawbacks to that honorable service will be exacerbated."

The Chief Justice praised Chief Justice Burger for his many contributions to the judiciary during his tenure as Chief Justice, stating that Chief Justice Burger had "demanded . . . that we think of the administration of justice in systemic terms." He noted as being among the accomplishments marking Chief Justice Burger's tenure: circuit executives for federal courts, the American Inns of Court, the National Center for State Courts, the Institute for Court Management, the State Justice Institute, federal–state judicial councils, and an annual seminar for leaders of the three branches to exchange views.

The Chief Justice cited a number of steps taken in 1986 to meet evolving needs of the judiciary: the enactment of a Social Security law change affecting senior judges; the approval of a supplemental appropriations request that "relieved the courts of the dilemma of either extending a brief moratorium on civil jury trials or allowing such trials to proceed with no appropriated funds for juror fees"; enactment of improvements in the Judicial Survivors' Annuity System; the U.S. Sentencing Commission's release of preliminary draft sentencing guidelines as mandated by Congress; and Congress's authorization of 52 additional bankruptcy judgeships. Pointing out that "last year, our bankruptcy courts had a 31 percent increase of new case filings," the Chief Justice said, "I am confident Congress will act quickly to appropriate funds for salaries, thus allowing the courts of appeals to fill those positions."

Looking ahead to 1987, the Chief Justice urged public officials and citizens to participate in the observance of the bicentennial of the Constitution.

The Chief Justice urged Congress to "enact appropriate legislation" to create a national court of appeals or an intercircuit tribunal, as recommended by Chief Justice Burger. Also needed, the Chief Justice said, is the elimination of "as much of the Supreme Court's mandatory jurisdiction as the Constitution permits."

"[W]e must pay careful attention to the experience of the federal district courts currently experimenting with court-annexed arbitration," the message stated, and must also welcome the continued "lively debate" among the bench and bar about the 1983 rules amendments creating "sanction power" to constrain abuse of the litigation process.

"The developments with the sentencing guidelines should be closely monitored," with a period for the judiciary and the bar to study and learn the new procedures before their implementation.

Calling it a "matter of judicial housekeeping," the Chief Justice noted his appointment of a committee of judges "to help me assess the internal structure and procedures of the Judicial Conference of the United States," with a goal of making the Conference "even more effective."

[Copies of the Chief Justice's 1986 Year End Statement are available from the FJC's Information Services Office.] ■

STAFF SAFETY, from page 3

the program.

The safety training program is designed for classes of not fewer than 15 and not more than 30 persons. Current demand for the program is so high that presentations will be scheduled through fiscal year 1988.

Questions concerning the staff safety training program can be addressed to David Leathery, Training Administrator, Division of Continuing Education and Training, FJC, 1520 H Street, N.W., Washington, DC 20005 (tel. 202/ 633-6024). ■

Written Comments On Revised Draft Guidelines Sought

The U.S. Sentencing Commission has asked to receive written comments on its revised draft sentencing guidelines no later than Mar. 16. It will send the revised draft to all U.S. district and circuit judges, magistrates, federal public defenders, chief U.S. probation officers, U.S. attorneys, and many defense attorneys, as well as other interested organizations and individuals.

NEWS FROM THE SENTENCING COMMISSION

The commission must submit the guidelines to Congress in final form by Apr. 13.

The commission describes this revised draft as differing "significantly in both form and substance" from the preliminary draft issued last September. Commission Chairman William W. Wilkins, Jr., said that "those who study the revised draft will find it more workable as well as theoretically sound and principled."

The commission noted the "thoughtful comments from hundreds of individuals" on the preliminary draft had illuminated various problems that it has addressed in the revised draft, including:

Complexity. The commission describes the revised draft as "significantly simpler and easier to understand and apply," with mathematical computations greatly reduced, and multiplication and fractions entirely

See SENTENCING, page 6

PERSONNEL

Death

Walter R. Mansfield, U.S. Circuit Judge, 2d Cir., Jan. 7

SENTENCING, from page 5

eliminated.

Cross references. Cross references within the guidelines have been eliminated.

Severity. The revised draft's numerical values for various offenses have "been extensively revised from the preliminary draft . . . in light of continuing empirical research, public comment, and commission discussion." The commission pointed out again that the values in the preliminary draft guidelines were largely to facilitate analysis and testing of its format and structure.

Discretion. The revised draft allows for the exercise of "significantly more" discretion by the judge at sentencing.

Impact analysis. The commission "fully realizes its statutory directive to determine prison impact" but regarded an impact study on the preliminary draft as "an unjustified expenditure of resources" in light of its deadlines and the tentative nature of that document. It said that executing an impact analysis on the preliminary draft would have delayed publication until early this year and severely limited the opportunity for public comment. The commission's research staff and the Bureau of Prisons are jointly developing a computer model to assess the impact a more finalized set of guidelines would have on correctional resources.

Correctional resources. The commission acknowledged that "responsible public policy must be weighed with the costs of that policy," but noted that the legislative history is explicit that its policy decisions should not be bound by existing correctional resources "in producing guidelines that best achieve the purposes of sentencing."

Probationary sentences. The revised draft provides the court "more latitude" in imposing a probationary sentence but does not make probation a viable sentencing option for every offense. "Publication of the preliminary draft last September proved extremely beneficial to the commission," said Judge Wilkins. "The revised draft offers a vehicle for extensive public comment. We again solicit your critical analysis." ■

Positions Available

Circuit Executive, 10th Cir. Salary (prior to proposed presidential/congressional salary increase) to $70,761. Position involves top-level executive functions; familiarity with accounting principles, statistics, and computerization. Law degree highly desirable. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. Send resume by Mar. 6 to Chief Judge William J. Holloway, c/o Circuit Executive's Office, C-529, U.S. Courthouse, Denver, CO 80294 (tel. 918/581-7416).

* * *

Director, Office of Staff Attorneys, 9th Cir. Salary from $45,763 to $69,976. Two-year term commencing September 1987. Supervises 31 court attorneys and support staff. Applicants should have at least 5 years' legal experience, with academic experience preferred. For details contact Gary Widman, Director, Office of Staff Attorneys, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 547, San Francisco, CA 94101 (tel. 415/556-7361).

EQUAL OPPORTUNITY EMPLOYERS

CALENDAR

Feb. 4–6 Conference of Metropolitan Chief Judges

Feb. 5–6 Judicial Conference Committee on Administration of the Criminal Law

Feb. 6 Judicial Conference Committee to Study the Judicial Conference

Feb. 12–13 Judicial Conference Advisory Committee on Civil Rules

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is a place where we ought to be subjecting the security interests of the United States to a final determination. Eight out of the 15 judges there come from countries that don't ever take anything to that court. It is not the place where Congress, certainly, wants us to have issues of that kind resolved.

What are your responsibilities as State Department Legal Adviser?

I have a variety of responsibilities just like a lawyer would in a corporation or a major agency. I serve my boss, the Secretary. I attend various meetings in the building for the purpose of listening and ensuring that nothing is happening that might create a problem, and I suggest ideas that relate to law. I review the work of my staff on its way up to the seventh-floor principals. I also serve other principals, such as the Deputy Secretary and the Under Secretary for Political and Military Affairs. Each of these principals is assigned areas of responsibility and sometimes they need legal advice and they seek it from me. In addition to that, I have my own areas of responsibility, such as sending letters to courts suggesting the law, handling extradition negotiations, or extradition treaty negotiations, or handling relations with law enforcement agencies. But the great mass of work comes from my staff. It is generated by requests and issues that they receive from their clients around the world. I review those and tell people what I think. The work is very high quality work but occasionally it can—I hope does—benefit from my guidance.

And then there are special projects. The Secretary will say do *X* and I have had the good fortune of having certain assignments where I really took a lead role as a lawyer-diplomat to work on specific problems overseas. That kind of thing has happened to legal advisers in the past and it will happen to legal advisers in the future. It is just a question of being required for the right

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job at the right time.

How large a staff do you have to help discharge your responsibilities here and abroad?

I have a staff of about a hundred lawyers. They serve the entire State Department, including some 19 divisions, the regional bureaus, and the functional bureaus. I have three or four lawyers overseas. We have the U.S. Iranian Claims Tribunal that we work with on those plans. So it is a big office. It has been a great challenge administratively to run this office.

Would you comment on the relationship between the State Department and the Department of Justice since you have been in your present job. Do some of the responsibilities overlap?

Oh, sure. We have a lot of international antitrust issues so we confer with people in the Antitrust Division. We have many, many dealings with the Office of Legal Counsel. The relationship is very good. We work very closely with Justice. They have their agenda and we have our agenda. They see themselves as becoming increasingly involved in international affairs, and properly so.

On the other hand, we still remain responsible for assisting the Secretary of State in conducting foreign affairs and making sure that foreign affairs concerns are satisfied in connection with legal activities. Occasionally there are differences of view with the Department of Justice across the board on a variety of issues. Many of these differences of view are not differences between the legal people in each of the agencies. It will be differences of view between the head of a regional bureau here, let's say the African Bureau, and a U.S. attorney concerning a case that he or she is determined to pursue in the way one pursues an ordinary case. A regional assistant will be very concerned about the impact of some cases or some aspect of a case. We sometimes need to educate Department of Justice personnel, prosecutors and administrators, about the damage that can be done, sometimes needlessly, as a result of the normal kind of publicity-seeking activities of the prosecution.

Does it concern you when you think that you cannot possibly read every indictment?

Absolutely, it does scare me. I have had experiences where we have specifically asked to see indictments before they came down, and they have come down without our seeing them. And they have been harmful. So it does scare me. It's my job to review those kinds of papers and the U.S. attorneys resent it. I remember what it was like to be in a U.S. attorney's office and we didn't like being reviewed by anybody—not even by people in the Department of Justice in Washington. I am not at all surprised if they don't appreciate our interest in their cases.

They particularly don't want somebody from Washington coming and taking their case over?

Absolutely, but we don't try to take over their case. Sometimes you get a case like Zakharov, which was in Brooklyn, a spy case against a Soviet person in the U.N. We had our views and some people had different views. I said "some people" because I don't know the different views on what was done there. In that case, I can tell you the issues were presented to the high officials in our government and all the way up to the President. There was never a dissent of any kind from what the President decided.

You went to Israel to arbitrate a border dispute. Why were you selected?

Yes, Egypt and Israel. I went to both countries. I was actually shuttling between both countries on three different trips over the whole summer. Israel and Egypt have had a long-standing dispute about who owns Taba, which is a little piece of land that the Israelis did not give back to Egypt when they withdrew from Sinai. The dispute goes beyond Taba. There are some 13 points that are still in dispute along the Egyptian–Israeli border. I went out to help the parties develop a *compromis*, as we call it, essentially an agreement under which the dispute would be arbitrated. I didn't go out to mediate or decide the dispute but to help the parties agree on the form and content of this arbitration *compromis*. I think I was asked to do it because the issues and the whole process of developing a *compromis* are intensely legal. It is a lawyer's job in large part. We had one of the lawyers on my staff helping some of the diplomats in the department do it. They had reached a point where they weren't making any more progress, so the Secretary asked me to step in and see what I could do to make it move. The attempt to develop a *compromis* had been underway for over a year before I got involved. It had been going on and on and then finally it reached sort of a deadlock, and the Secretary asked me to go out and see what I could do. I went out there and worked with my own lawyer, an excellent fellow. I also worked with the diplomats over there, our ambassadors; I had the advice and support of our people here and political officers in each of the embassies; so we had a team.

"I was actually shuttling between [Egypt and Israel] on three different trips over the whole summer . . . to help the parties agree on . . . arbitration."

There is so much talent here, ready to jump in and do some interesting project. When your number is called and you get to do something like that you get a terrific team because you have these people who are talented, capable, and very supportive. You

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can contact anyone in the government; it is extraordinary. For example, in this particular instance, the Defense Mapping Agency gave us a lot of help in furnishing the technicalities of the *compromis* at the end of the process. We also got help from the Vice President. Vice President Bush played a tremendously crucial role during his trip. He personally visited there. Several issues remained unsettled, and what we needed was a great sense of urgency on the part of the parties to get those issues wrapped up. So, suddenly there was the Vice President, whom both sides respected, going out there. I went to Vice President Bush's office before this trip and we talked it through. I also talked to his staff. We prepared him to play a role in the process. His presence made a real difference, and he really moved that matter along very quickly.

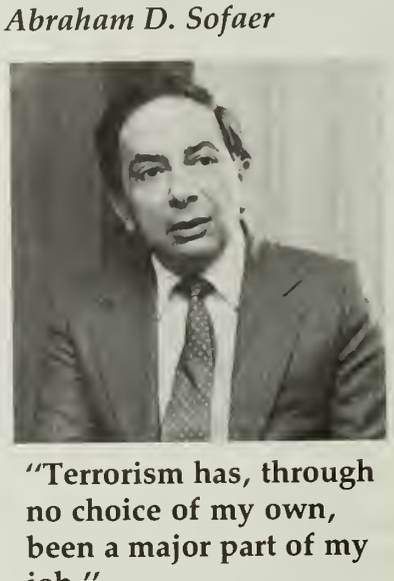
Is it now settled?

The *compromis* is final and was duly ratified by both governments in early December. So the arbitration process is under way. And Egypt has now sent its ambassador back to Israel. Egypt had refused to staff its embassy with an ambassador since the Lebanon war, and the Taba *compromis* agreement was the last condition that had to be satisfied before President Mubarak would once again staff that embassy with a person of ambassadorial rank. The person who was there, Ambassador Bassiouny, was excellent. He had the rank of chargé d'affaires and was promoted to ambassador when this happened. So Egypt now has an ambassador in Israel, and he does a very good job.

In an essay in *Foreign Affairs* you argue that "law . . . has been placed very much at the service of those who embrace political violence." Do you believe that there were valid legal reasons to oppose the extradition treaty between the United States and Great Britain?

No. I think that the opposition was based on deep emotional pain that comes from the Irish/British experience. I found it very ironic to sit there and be berated by members of the Senate Foreign Relations Committee, particularly the Irish ones, for supporting the treaty. My career has somehow intersected with great American Irishmen; they have played an incredibly important part in my life, starting with Skelly Wright and William Brennan, both of whom I clerked for, Senator Moynihan, who essentially made me a judge, and a whole series of other people. It was bizarre to be accused of being anti-Irish.

Abraham D. Sofaer



"Terrorism has, through no choice of my own, been a major part of my job."

My position has always been that you can't have your favorite terrorists, and these senators know that. They issued a "Sons of Ireland" statement, which all of them had signed, in which they said violence is advancing nothing in Northern Ireland but more bloodshed and more violence. And, they said, violence is impermissible in pursuit of these objectives, whatever your objectives are. That is all we were saying in supporting the supplemental extradition treaty. The effort there was to stop the process that had begun in our courts of finding that there was some kind of a revolution in Northern Ireland that entitled people to act violently against policemen and judges, and potentially against civilians. Now the people involved in particular cases may have been charged with killing a soldier or killing a policeman, but they came from organizations that didn't limit their attention to soldiers and policemen. Furthermore, I said to the Senate Committee, how could we really make this distinction in a democracy, where we have to rely on the vote in order to bring about change? These terrorists said that they are part of a revolutionary movement—a war of national liberation as they call it—that they really are military people fighting a war, rather than criminals committing a murder. How would we like it, and how do we like it, when someone in the FALN sets off a bomb in southern Manhattan and blows up an Irish policeman? It happens that a bomb two years ago, on Christmas Day I believe, blinded an Irish-American policeman and blew the hand off another. And this was done by people here who represent 1 percent of the population of Puerto Rico, who want freedom. However honest their feelings, however warmly they espouse their cause, we just cannot as a democratic society allow people to go around killing other people. If you had a dictatorship and someone was in a revolutionary movement against it, well, then we are not going to seek to limit the political offense exception in such countries. We told the Senate that. No matter how intensely you feel about Northern Ireland and the Irish cause, the United Kingdom is not a dictatorship. There are ways of bringing about change through the democratic process, and the recent agreement that was obtained between the Republic of Ireland and the United Kingdom is an indication of that. I think that Irish Catholics and Irish Protestants can live together because we know that from the Republic.

Terrorism has, through no choice of my own, been a major part of my job. That is why I wrote my article, because I had run into so many areas

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in which I thought the law was not being used to bring about civilized order; rather, it was being used to encourage violence.

Do you believe there is now a positive trend to get away from that?

Definitely. I was with the Indian legal adviser yesterday and we were talking about this trend. People in the nonaligned nations, people everywhere, even in the Soviet Union, all understand that it went too far. Terrorism is horrible; it interferes with commerce, it interferes with progress on the issues. It would be inconceivable to me to have someone like Arafat returning to the U.N. in triumph like he did in the old days. We have learned a lot since then.

Are you optimistic that terrorism is on the wane?

Well, historically it goes in cycles. You have to be realistic about it; it goes in cycles. The chances are, even if we didn't do anything, it would slow down just because of forces and people getting sick and tired of it. I think Arabs, the Arab people of the world, overwhelmingly are sick and tired of terrorist violence. Most of the victims of the radical Palestinian groups have been Palestinians, moderate Palestinians. Some of these moderate Palestinians support Arafat. They are out there working for the Palestinian state, but they are not radical enough for other Palestinians who therefore kill them. Take the mayor of Nablus, El Musri. Nablus is the most populous Arab city of the West Bank. It is a very powerful city with a big Arab population. King Hussein approved his selection as mayor, Arafat approved his selection, and Israel approved his selection as part of a process that we have been working on to improve the quality of life on the West Bank and create leadership in the local communities—working toward a time when the Arab population can take more and more of their self-government. Everyone understands this is a very difficult and painstaking process; that people have to make compromises in order to bring about these little steps, such as appointing El Musri as mayor. He was a classic Palestinian nationalist who believed that his people should have their own land, but he was also a practical man, a pragmatist at the same time, a brilliant fellow of good personal qualities and who came from one of the most powerful and wealthy families in the area. He was an ideal figure to help the Palestinian cause, and yet they killed him on the streets of Nablus, just shot him in the back. It is such a waste to see a person like that come up among his people and be senselessly killed, a man who could have performed a really important role for his people, who could have helped overcome differences and built bridges to the future. He was no friend of Israel in one sense; but he was a pragmatist, a man who could work with Israel, with Jordan, with Arafat, and with everybody in the United States to improve things for his people in a way that was possible. His murder is the kind of thing that people get tired of. There is going to be some more of it, sure, particularly since guns cost so little now and bombs are so easy to make. But I think that the wheel has turned on political violence.

"There were 45,000 waivers of the McCarran Act exclusion last year ... and in only a handful of cases were waivers denied."

Do you get involved in the so-called "watch list" for foreign citizens whose entry into this country is deemed undesirable?

I am one of those people who passes on those problems, but I don't decide them finally. Generally the person who ultimately makes those decisions, absent special reasons, is Michael Armacost, the Under Secretary for Political and Military Affairs. Generally speaking the regional bureau is involved, consular affairs, human rights, possibly U.N. affairs and law (legal affairs) are all heard from on each of those issues. I try to implement the Secretary's policy. The Secretary does not believe in ideological exclusion. He has said so. The Attorney General has concurred in that and we—the top people in the administration—agree with them. We do not believe that people ought to be excluded solely for their beliefs or for their party membership. We may actually feel on the basis of some evidence—not overwhelming, not the kind of evidence we would want to take to court, but some evidence—that the person is here on a mission of some kind to collect information, or to collect money for some cause that the United States feels is not in its interest. Then the Secretary will make a determination. There were 45,000 waivers of the McCarran Act exclusion last year; 45,000 waivers, and in only a handful of cases were waivers denied. Looking at this issue in proper focus, waivers are virtually routine.

What about alien plaintiffs in the federal courts who are trying to use the federal court system as a forum for their disputes?

Well, the issue always relates to jurisdiction. If there is jurisdiction they have the right to come here and use the courts. The Constitution of the United States clearly contemplated that citizens of a foreign country, and even foreign states, could come to our courts and sue. The Constitution explicitly says the Supreme Court will have original jurisdiction over certain types of cases involving foreigners. And in our world the fact is that sometimes the United States is an important market economically, and people will sue here because of that and have a jurisdictional basis for doing it. One case that I handled, *Sharon v. Time Magazine*, is an example. Israeli General Sharon came to New York to sue an American magazine. That American magazine is

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published here in the United States, but is also distributed in Israel and around the world. I certainly raised with the parties whether they had any question about the jurisdiction of the federal courts. Cravath, Swain & Moore, who represented the defendant and who must have done millions of dollars of work in this one case, never raised a jurisdictional objection. That is the world we live in. We have very broad jurisdictional statutes.

Were you involved in the decision to bomb Libya?

I was involved in the whole process that led to that. We got to that point only after a number of lesser measures were exhausted, including our Libyan sanctions in January, which were drafted by my office. My opinion on the legality of that kind of an action was written at that time.

Have you any message for your former colleagues on the bench?

Well, that I miss the bench. I miss playing an important role in cases between people. I miss the structure and discipline of the bench. I was in a sense a big fish in a small pond in my court. You had your case, and it was *your* case. You were in charge of it as a district judge, and generally speaking 99 percent of the time that was the end of the matter.

I am very proud of the American system. In my present job I am a small fish in a big pond. There is a lot more room to swim and enjoy yourself, and you look at a lot of different issues. But it is a different world. You have far less guaranteed authority or guaranteed role. It is more exciting as a result, because you don't know what you are going to do tomorrow, and it is more interesting if you haven't done it. If I had done my present job for six years, I am sure I would find being a judge more interesting. But I absolutely believe that my former colleagues on the federal bench are doing the work of God. ■

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by the district court, which may make a de novo determination of the matter.

The Centers for Disease Control have estimated that the minimum number of claims that would be filed under the compensation program would be in excess of 9,000 annually. The act makes the filing of a petition and judgment on the petition a precondition to the right to bring a subsequent suit in state or federal court. It also permits petitions to be filed concerning some claims that were previously the subject of unsuccessful litigation.

Some observers have seen the latter feature as a threat to the finality of state and federal judgments. They are also concerned that provisions in the act allowing the petitioner an option to accept or reject the final judgment of the district court may violate the Article III prohibition against advisory opinions. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Deputy Attorney General Burns Discusses Role Of Special Masters, Caseloads, Other Concerns

Deputy Attorney General Arnold I. Burns, born in New York City, received a B.A. from Union College and an LL.B. from Cornell University. He was a partner in a New York law firm for many years. In 1986, he was appointed associate attorney general. Shortly thereafter, he became deputy attorney general.

How has the Justice Department operated during your tenure as deputy attorney general?

The policy of the department is established by the attorney general. In this Department of Justice, we have an enormous amount of collegiality. The attorney general of the United States, Ed Meese, is a very collegial man. By that I mean that he seeks out the advice and the opinions of others. So policy is really, I think, a collegial matter with a lot of debate, discussion, consideration, with the final decision resting with the attorney general.

What are your responsibilities as deputy attorney general?

As we operate today the deputy attorney general is the day-to-day chief operating officer with the Department of Justice, and the attorney general is the chairman of the board and chief executive officer, consistent with what I have said to you heretofore about the policy-making in the department. As the chief operating officer of the Department of Justice, I am responsible to the attorney general for all the civil and criminal matters in the department. Associate Attorney General Steven Trott reports

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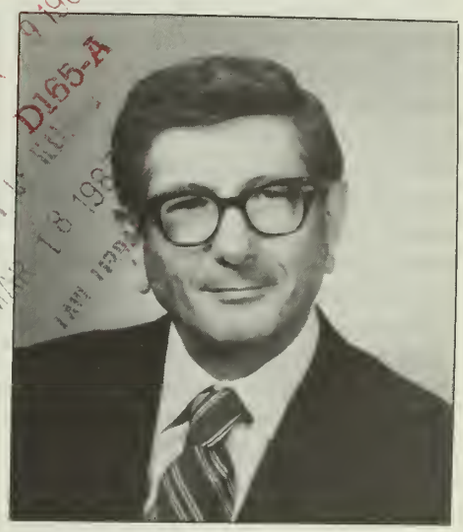
Interim Local Rules for Bankruptcy Cases Proposed Following Enactment of New Law

The Advisory Committee on Bankruptcy Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has drafted and distributed to all district courts and bankruptcy courts interim rules that it recommends be adopted as local rules of court in light of recent legislation affecting some bankruptcy cases. That legislation, the "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986," Pub. L. No. 99–554, took effect on Nov. 26, 1986. The act made several changes in the Bankruptcy Code, including the addition of a new chapter 12, dealing with family farmer debt adjustment. The interim local rules are intended to provide guidance to the bench and bar until new rules can be approved by the Judicial Conference, the Supreme Court, and Congress.

The interim rules will be binding only to the extent that they are adopted as local rules of court or are made applicable to a particular case by a bankruptcy judge in the exercise of the judicial function. ■

Judge Alvin B. Rubin Appointed as FJC Board Member



Judge Alvin B. Rubin (5th Cir.) has been elected by the Judicial Conference of the United States to the Board of the FJC, to fill the unexpired term of Judge Arlin M. Adams (3rd Cir.), who has resigned from the bench. Judge Rubin has been on the Fifth Circuit bench since 1977. He served as a U.S. district judge (E.D. La.) from 1966 to 1977.

A graduate of Louisiana State University (B.S., LL.B.), Judge Rubin served in the U.S. Army from 1941 to 1946. He was an arbitrator for the Federal Mediation and Conciliation Service from 1949 to 1966 and is an adjunct professor at LSU Law School.

Judge Rubin was a member of the Judicial Conference Subcommittee on Judicial Statistics, a member of the Committee on Court Administration, and chairman of the Subcommittee to Examine Possible Alternatives to Jury Trials in Complex Protracted Civil Cases. He has lectured frequently at FJC seminars and workshops and has coauthored *Law Clerk Handbook: A Handbook for Federal District and Appellate Court Law Clerks*, a second edition of which will be published this year.

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to the attorney general on criminal matters emanating from the Criminal Division, the Bureau of Prisons, and the Drug Enforcement Agency, on some FBI matters, and on matters from the U.S. Marshals Service. All of those matters I mentioned are reported to the attorney general through the deputy attorney general. As deputy attorney general, I supervise our civil litigating divisions, which include the Tax Division, the Civil Division, the Civil Rights Division, the Antitrust Division, and the Lands and Natural Resources Division, each of which has important criminal jurisdiction.

Also, the deputy attorney general supervises the U.S. bankruptcy trustee program, emerging as something more important with new legislation enacted by the 99th Congress. The new law expands and makes permanent the U.S. bankruptcy trustee program. Foreign claims settlement also comes under the deputy attorney general. The deputy attorney general is responsible for the administration of the department, which includes the budget, audit, and personnel and training and things of that nature.

What are your priorities?

The Department of Justice has an established set of priorities that have been set by the attorney general. We consider the war on drugs to be our number-one priority. With new anti-drug legislation that came out of the Congress last year, we are going to continue our "full court press"—and with added resources and larger efforts. The war against organized crime continues to be an important priority, and if one reads the press one can truly conclude that we have broken the back of organized crime in this nation. We've broken the code of silence, we've broken up Mafia families. Judge Richard Owen in New York sentenced each of a number of leading Mafia figures to a hundred years in the penitentiary. Economic crime continues to be an important priority. The enforcement of our civil rights laws continues to be an important priority. We have broken the back of the Ku Klux Klan, for example, in our enforcement of civil rights.

The war against international terrorism continues to be very important, and the incidence of terrorism here at home is way down. There were 6 incidents in the continental United States last year; that is down from more than 25 three years before. We are working effectively in the area of terrorism. The protection of the U.S. treasury continues to be an important aspect of our work in the Department of Justice. We have 205,000 pending cases with claims aggregating some 500 billion dollars, so that is very important. The government continues to be sued; it is not up dramatically, but it continues apace. We are involved in the affirmative civil litigation for the government—suing people who owe the government money—and that is important, particularly in cases involving Defense Department fraud. Not only are we interested in prosecuting crime, but we are also interested in recovering monies out of which the government has been defrauded. The enforcement of our antitrust laws continues to be an important priority, as does the protection of our environment through both civil and criminal litigation. I think you have gotten the picture.

Our plate is full and getting fuller. Three pieces of legislation alone last year have added mightily to our plates. First, I mentioned the anti-drug legislation; second, the immigration bill; and third, the bankruptcy judgeship and U.S. trustee legislation. The President has submitted a budget for 1988, and the resources that the President is asking for the Department of Justice will include substantial additional resources for our U.S. attorneys and resources for investigators in the Drug Enforcement Administration, the FBI, the Marshals Service, and INS. So we are looking forward to the implementation of those new laws and to continued effective civil and criminal law enforcement.

What have you had in mind in making managerial changes?

First, kinds of managerial priorities. The attorney general and I are very anxious to continue working to bring the Department of Justice together and to have it become more of a unified department—increasing communication and liaison between the people here in the main Justice Department building and our 93 U.S. attorneys' offices across the country.

Second, along the same lines, we are anxious to bring together the components of the Department of Justice—the Bureau of Prisons, FBI, and so forth. We see in our mind's eye greater cross-pollination with respect to personnel and communication among all of our components and the people in this main building.

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AO Memo on Anti-Drug Act Penalties Available

Federal judicial personnel interested in obtaining a copy of a memorandum prepared by the AO and previously circulated concerning provisions of the Anti-Drug Abuse Act of 1986 that redefine and increase penalties for some drug-related offenses and prescribe mandatory minimum sentences for certain violations (including mandatory terms of supervised release) may write to the FJC's Information Services Office or to the director of the AO.

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Bennett, Robert W. "Judicial Review as Law." 75 *Illinois Bar J.* 202 (1986).

Burbank, Stephen B. "Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach." 71 *Cornell L. Rev.* 733 (1986).

Burger, Warren E. "Lawyers and the Framing of the Constitution." 59 *New York State B.J.* 10 (1987).

Carter, Gary W. "The Commissioner's Nonacquiescence: A Case for a National Court of Tax Appeals." 59 *Temple L.Q.* 879 (1986).

Federal Judicial Workload Statistics. Administrative Office of the U.S. Courts, September 1986.

Feinberg, Kenneth R., & John S. Gomperts. "Attorneys' Fees in the Agent Orange Litigation: Modifying the Lodestar Analysis for Mass Tort Cases." 14 *New York University Rev. of Law & Social Change* 613 (1986).

Fish, Peter G. "From Virginia Readjuster to United States Senior Circuit Judge: The Ascent of Edmund Waddill, Jr. (1885–1931)." 30 *American J. of Legal History* 199 (1986).

Freer, Richard D. "Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19." 60 *New York University L. Rev.* 1061 (1985).

Goldman, Sheldon, & Charles M. Lamb. *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts.* University Press of Kentucky, 1986.

✓ Heflin, Howell. "Tribute to Judge John C. Godbold." 132 *Congressional Rec.* S17,227–28 (daily ed. Oct. 18, 1986).

"Judicial Activism in the States: The California & Texas Courts." 2 *Benchmark—A Bimonthly Report on the Constitution and the Courts* nos. 3 & 4 (May–Aug. 1986).

Kakalik, James S., & Nicholas M. Pace. *Costs and Compensation Paid in Tort Litigation.* Institute for Civil Justice, Rand Corporation, 1986.

Lieberman, Jethro K. *The Enduring Con-*

See **SOURCE, page 8**

NEWS FROM THE SENTENCING COMMISSION

The U.S. Sentencing Commission has scheduled public hearings for Mar. 11–12 in Washington, D.C., to receive testimony on its revised draft of sentencing guidelines. The hearings will be held in the Ceremonial Courtroom of the U.S. Courthouse on 3rd St. and Constitution Ave., N.W.

All Article III judges, members of Congress, U.S. attorneys, federal public defenders, U.S. magistrates, chief probation officers, and U.S. probation offices were mailed copies of the revised draft early in February. Because of tight deadlines for issuing final guidelines, the commission requests that all comments on the draft be received by the commission by Mar. 16.

The commission was also considering whether to publish sentencing guidelines for federal capital offenses, following a hearing Feb. 17 held to determine the commission's responsibility concerning such guidelines. ■

Robert Feidler Is New Legislative Affairs Officer at AO

Robert E. Feidler joined the Administrative Office last month as the new head of the Legislative and Public Affairs Office. Immediately prior to joining the AO, Mr. Feidler was chief counsel and staff director of the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary. From 1981 to 1986, he was chief minority counsel of the Senate Judiciary Committee's Subcommittee on the Constitution, and from 1977 to 1980, he was chief counsel of that committee's Subcommittee on Improvements in Judicial Machinery.

Mr. Feidler has worked on most bills and issues related to the federal courts over the last decade. For the last five years he has also been involved in most major antitrust and intellectual property issues. He is a major in the U.S. Army Reserve.

Paul Summitt, who has been with the AO since 1984, will be Mr. Feidler's deputy. Prior to coming to the AO, Mr. Summitt was special counsel for criminal law to the Senate Committee on the Judiciary, and he has held other jobs with that committee and with the U.S. Department of Justice. ■

1987 Circuit Judicial Conferences

First Circuit	Oct. 13–15	Danvers, Mass.
Second Circuit	Oct. 15–17	Hershey, Pa.
Third Circuit	Sept. 16–18	Philadelphia, Pa.
Fourth Circuit	June 25–27	Hot Springs, Va.
Fifth Circuit	Apr. 20–22	New Orleans, La.
Sixth Circuit	June 3–6	Grand Rapids, Mich.
Seventh Circuit	May 10–13	Chicago, Ill.
Eighth Circuit	July 16–18	Colorado Springs, Colo.
Ninth Circuit	Aug. 17–21	Waikoloa, Hawaii Island
Tenth Circuit	July 29–31	San Diego, Cal.
Eleventh Circuit	May 10–12	Birmingham, Ala.
D.C. Circuit	May 27–30	Hot Springs, Va.
Federal Circuit	May 8	Washington, D.C.

BURNS, from page 2

Third, I mentioned civil and criminal litigation. One of our emphases is to improve the coordination between the two here in this building and in the various offices of our U.S. attorneys.

Fourth, we are working very hard at streamlining and improving our budgetary process here. We have established what we call our Departmental Resources Board, which I chair. The idea is to create our budget with greater precision, with greater understanding by our leadership, understanding by the leaders of our component parts. In other words, in building a budget it is very easy to fall into a habit of working off of the prior year's numbers, to be arbitrary. I must say, I think we did a very fine job here this year, and we are looking forward to improving the process for next year.

Fifth is an increased emphasis on personnel. We are establishing a personnel board, which I will chair, the idea being to establish procedures for encouraging the development of career opportunities in the Department of Justice. When you can concentrate on career development and take a guiding hand toward the movement of people throughout the department—provide upward mobility, incentives, and training—that is very important. We want to place some new emphasis on that. We are going to do that to continue to build on a really solid core of first-rate attorneys. I am a relative newcomer to government service; I celebrated my first year in the department on Jan. 6. I came here from 33 years in the private practice of law. The thing that astonished me, coming here with the traditional, the usual biases and prejudgments about these things—what astonished me was the enormous quality of the people here and the tremendous caliber of the lawyers here. We want to keep working to improve the training.

So a sixth area of management concern is training. We do a lot of training here. We run a trial advocacy program. We have another training program in which we train lawyers outside the Justice Department, lawyers throughout the government. We have a program called the Attorney General's Advocacy Institute. Now that is trial advocacy and appellate advocacy, and we trained more than 1,600 of our 5,000 lawyers last year. During the same time our Legal Education Institute, which trains lawyers outside the department, trained roughly 5,000 of the 20,000 lawyers in other branches of government. So training is very important and we intend to continue emphasizing this.

"The civil RICO statute ... just adds to the burden of the courts."

Deputy Attorney General Arnold I. Burns

We are going to be reorganizing things to maximize efficiency, to maximize cost reduction, to facilitate the ease of administration of the department. So we are working on some reorganization changes which we intend to submit to the Congress before very much time lapses. But I can't tell you more about it yet. It is premature.

Would you comment on the role of special masters under the National Childhood Vaccine Injury Act?

When the President signed the vaccine bill he expressed some serious reservations about that aspect of the bill, but because the bill had other good points in it, he signed it. We think that the special masters provision is a major defect in the bill. We do not think that special masters working under the supervision of U.S. district court judges are the appropriate vehicle for sorting out these issues of entitlement in cases in which youngsters sustained injuries from the use of a vaccine. There are a couple of reasons why that is not a good idea. Reason one—this entitlement program—would it be administered in some uniform fashion? U.S. district court judges, who are judges and whose function ought to be limited to the adjudication of cases, are really being asked to administer a program. It raises all sorts of problems. The second thing that is wrong with it is that our judges are today overburdened and overworked in discharging the responsibilities they have in the adjudicative area. This vaccine bill will require funding, and when we go to the Congress for the funding, I think we will ask for

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BURNS, from page 4

some amendments that will address the issue of the role of special masters under this bill.

You have made comments in the past about the role of special masters in other kinds of cases, suggesting that perhaps they have been overused.

The judicial function is an adjudicative function. It is one thing to say, "I appoint a special master to ascertain certain facts," such as whether this microphone has been properly activated and we are truly now recording this interview. I want finding of fact, and that might be in given case an appropriate role for a master. But the judge appoints a master to supervise the activation of all microphones in the District of Columbia for the ensuing year at every interview that should ever take place. When we have constitutional issues that are implicated, we have serious questions raised, and the question is, who is going to pay for that master? We in the department are going to resist payment for masters who are regulating the world, as opposed to masters who are ascertaining and adjudicating facts in aid of the U.S. district court judge's adjudicative responsibility.

There are judicial procedures which we would avail ourselves of, including the right to appeal judgments or orders directing appointments of special masters. My example about microphones, of course, is hyperbole, but I can assure you that I can give you real-life examples that are much more extreme than the one that I invented on the spur of the moment—for example, masters who are monitoring on a continual basis the altitude of helicopters flying over certain lands for environmental purposes, masters who are running prisons and hospitals. And one could go on and on. There are examples we could find that are worse than the one I used.

Do you have any specific legislative goals in the 100th Congress?

Well, let's start with RICO. There has been an awful lot written and said about the civil RICO legislation. I think there is an awfully wide consensus that the civil RICO statutes have been used in a manner far beyond what Congress ever intended.

This goes back to what I said earlier about the special masters under the vaccine act superintending and administering what is essentially an entitlement program. The civil RICO statute, like that program, just adds to the burden of the courts and adds to the burden of the judges. That is why they are groaning, when they were overworked and overburdened to start with. Civil RICO has been used as a remedy in ordinary cases involving antitrust, securities law, and common-law fraud, to cite but three examples. It's been used in cases where one could bring a suit sounding in antitrust, or in any one of the other areas I mentioned, and get adequate relief. It has gotten to the point now where if you don't throw in a civil RICO count you could be guilty of malpractice. Ordinary citizens, decent, law-abiding, honest citizens—bankers, merchants, insurance company agents—are sued under the civil RICO statute. Their friends and neighbors read in the newspaper that they have been sued as racketeers, and that is a terrible thing.

So I think there is a wide consensus. That wide consensus did not break down in the last Congress. My explanation for what some see as a breakdown is that while everyone agreed that some rectification was required, they could not agree on the way to do it. From our point of view in the Department of Justice, we will be supportive of legislation that restricts the availability of the civil RICO statute to the private bar. And because there is that wide consensus, and because I don't think it is broken down, I think we will indeed get legislation in the 100th Congress. But if I were to predict what it will be, I would be either a knave or a fool.

As for other legislation, tort reform remains an important priority for us. We in the Department of Justice took a leading role in tort reform. We had an important working group on tort reform led by Assistant Attorney General Richard Willard. The attorney general, the deputy attorney general, Assistant Attorney General Willard, and others in the department crisscrossed the country speaking to groups about tort reform. We are hopeful that we will see tort reform. I hope that we will see legislation not only in Congress, but also in state legislatures around the country, addressing this important issue.

"[T]he Department of Justice ... will be supportive of legislation that restricts the availability of the civil RICO statute to the private bar."

"I hope that we will see [tort reform] legislation not only in Congress, but also in state legislatures around the country."

I think that the administration will be seeking to reintroduce our antitrust reform package. I think you will see essentially the same kinds of things that we asked for in the last session. We will seek to codify our merger guidelines. We will probably suggest a change in law regarding interlocking directorates. We will have some antitrust relief suggestions for some trade imbalance problems. The Sherman Act was passed in 1890; the Clayton Act was passed in 1914. That is a long time ago, and the world has changed. Competition in the world

See BURNS, page 6

200 Years Ago...

March 1787: Under the 1783 peace treaty, the United States had agreed that Congress would recommend "earnestly" that state legislatures "provide for the restitution of all estates, rights, and property" confiscated from British subjects and noncombatant loyalists. The British government complained of bad faith on the part of the states in implementing this and other provisions, but all Congress could do when it responded in March 1787 was remind the states that the treaty was "part of the law of the land" and urge that they observe it.

Congress's inability to act more vigorously under the Articles of Confederation was also reflected in the treatment of the many cases that foreign and domestic shipowners filed to regain vessels that American forces seized during the Revolution. State courts usually upheld the captures, and disappointed litigants appealed to Congress.

Congress heard the appeals through a standing committee until 1780, when it established the three-judge United States Court of Appeals in Cases of Capture. Although the Articles of Confederation authorized Congress to establish rules for deciding capture and prize cases, neither it nor the court had authority to compel compliance with their decisions. By 1787, the court had been undermined by the widespread refusal to honor many of its mandates.

BICENTENNIAL OF THE U.S. CONSTITUTION

CALENDAR

Mar. 2–7 Seminar for Newly Appointed Bankruptcy Judges
Mar. 17–18 Judicial Conference of the United States
Mar. 23–24 Staff Safety Training
Mar. 25–27 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits

BURNS, from page 5

has changed, and what we are looking to do is to bring the antitrust laws into the modern age and recognize that we are dealing now not with competition between Virginia and Maryland, but with global competition, global forces.

We will also reintroduce several important criminal reform bills. As in the last Congress, we will support exclusionary rule reform and habeas corpus reform. We will also press for the death penalty for certain terrorist crimes.

How does the department view the work of the U.S. Sentencing Commission, particularly as it relates to capital sentencing?

The Sentencing Commission, as you know, was established by an act of Congress and charged with the responsibility of coming up with new sentencing guidelines across the universe of crimes prescribed in all of our statutes, particularly title 18 of the U.S. Code. The Sentencing Commission has held many, many hearings. I think they should be complimented because there have been open hearings—they have solicited all kinds of opinion. We believe that the guidelines the commission is producing will go a long way towards reducing unwarranted sentence disparity that all too often prevails today.

During the course of their deliberations they asked the department what its view was as to whether or not the legislation setting up the Sentencing Commission authorized it to address the issue of guidelines for capital offenses. So we have given our opinion that the legislation did indeed authorize the commission to consider guidelines for all offenses and all punishments, including the death penalty. This is not to say that the Sentencing Commission can recommend capital punishment for crime a, b, c, d, e, or f. Congress has already prescribed the death penalty for many crimes on the statute books, and the only question here has to do not with the prescription of the penalty but with guidelines to provide for the constitutional methodology of carrying out such a penalty consistent with judicial decisions. This is something that the Sentencing Commission is charged with doing—not the Department of Justice, not the attorney general or the deputy attorney general. Now what the Sentencing Commission is going to do is something yet to be decided by the Sentencing Commission, so we will wait and see.

Is there any way to accelerate the judicial appointment process?

First, I think that sitting judges, when they decide to retire or to take senior status, ought to let the President know sooner rather than later. For example, a judge could advise the President, "Prospectively, I am planning to step down next January" (or a year from January, a year from February) "on my 65th birthday" (my 70th birthday, whatever the case may be), so that we are alerted as soon as we can be.

Second, I think we have a job here in the Justice Department of persuad-

See BURNS, page 7

Positions Available

Supervisory Staff Attorney, 8th Cir. Salary starting from $38,700 to $45,700, depending on experience. Must train new staff law clerks, serve as resource on substantive issues, and edit legal memoranda. Applicants should have progressively responsible legal work experience. Send resume, law school class rank, and writing sample by Mar. 31 to Senior Staff Attorney, U.S. Court of Appeals for the 8th Circuit, 1114 Market St., Rm. 625A, St. Louis, MO 63101.

* * *

Motions Practice Attorney, 8th Cir. Salary $32,500. Two positions in new staff unit to assist the court with substantive motion practice. Applicants must be able to communicate well in person and on telephone, work independently, and meet deadlines. Send resume and writing sample by Mar. 31 to Clerk of Court, U.S. Court of Appeals for the 8th Circuit, 1114 Market St., Rm. 511, St. Louis, MO 63101.

EQUAL OPPORTUNITY EMPLOYERS

BURNS, from page 6

ing the members of Congress to take this so very seriously and give this higher priority than it has had before and to provide us with cool, competent, qualified candidates so that we have people in the pipeline and in the hopper.

Third, again without sacrificing accuracy, we would hope to see if the FBI background checks could be speeded up. We hope that the American Bar Association procedure could be speeded up. So we are hopeful that we will proceed apace with the President's nomination of new judges after the appropriate screening process.

Do you have forms like the Senate Judiciary Committee has, which candidates are required to fill out?

Yes we do. We have a questionnaire.

Do you think the ABA screening is helpful? Some attorneys general have done away with it.

It is our view on balance that it is very helpful and that with some changes and modifications in the process, which we are talking with them about, it could be even more helpful. Yes, we do think it is good.

Do you have anything else you want to add?

Just that I want to thank you for coming and spending this time with me. It is a joy to share some thoughts with you about the Department of Justice. I also want to thank you and your readers for all that you do to help improve the administration of justice in this nation. ■

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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PERSONNEL

Nominations

Rena Raggi, U.S. District Judge, E.D.N.Y., Jan. 20

Michael S. Kanne, U.S. Circuit Judge, 7th Cir., Feb. 2

Edward Leavy, U.S. Circuit Judge, 9th Cir., Feb. 2

David Bryan Sentelle, U.S. Circuit Judge, D.C. Cir., Feb. 2

Bernard H. Siegan, U.S. Circuit Judge, 9th Cir., Feb. 2

Richard J. Daronco, U.S. District Judge, S.D.N.Y., Feb. 2

Ronald S. W. Lew, U.S. District Judge, C.D. Cal., Feb. 2

Malcolm F. Marsh, U.S. District Judge, D. Or., Feb. 2

Layn R. Phillips, U.S. District Judge, W.D. Okla., Feb. 2

James B. Zagel, U.S. District Judge, N.D. Ill., Feb. 2

Haldane R. Mayer, U.S. Circuit Judge, Fed. Cir., Feb. 3

James H. Alesia, U.S. District Judge, N.D. Ill., Feb. 3

David S. Doty, U.S. District Judge, D. Minn., Feb. 5

Robert N. Miller, U.S. District Judge, D. Colo., Feb. 5

Appointments

James L. Graham, U.S. District Judge, S.D. Ohio, Nov. 15

Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Nov. 24

Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Nov. 25

Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, Dec. 1

Frederic N. Smalkin, U.S. District Judge, D. Md., Dec. 2

Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Dec. 11

Elevations

Gene E. Brooks, Chief Judge, S.D. Ind., Jan. 1

Odell Horton, Chief Judge, W.D. Tenn., Jan. 1

Robert W. Porter, Chief Judge, N.D. Tex., Jan. 1

Santiago E. Campos, Chief Judge, D.N.M., Feb. 5

Senior Status

Phillip B. Baldwin, U.S. Circuit Judge, Fed. Cir., Nov. 24

Donald S. Voorhees, U.S. District Judge, W. D. Wash., Nov. 30

Robert M. McRae, Jr., U.S. District Judge, W.D. Tenn., Dec. 31

Howard C. Bratton, Chief Judge, D.N.M., Feb. 5

Resignations

James R. Miller, Jr., U.S. District Judge, D. Md., Dec. 1

Herbert J. Stern, U.S. District Judge, D.N.J., Jan. 4

NOTEWORTHY

Bankruptcy appeals not referrable to magistrates. Federal district courts lack power to refer appeals from bankruptcy courts to magistrates, the Seventh Circuit has ruled (*In re Elcona Homes Corp.*, No. 86-1541, Jan. 23, 1987). In 1984 legislation, Congress did not reenact a specific prohibition against referrals of bankruptcy court appeals to magistrates. Nonetheless, because conditions required for appeals to a panel of bankruptcy judges are carefully specified, but no provision for courts' referring appeals to magistrates is made, the court rejected the contention that Congress intended by omitting the prohibition to allow district courts to make such referrals.

* * *

S.D.N.Y. orientation program. Chief Judge Charles L. Brieant has announced the second annual orientation program for attorneys practicing in the S.D.N.Y., to be held Mar. 7 in New York City. The program will feature the clerk and deputy clerks of the court, the district executive, other court officials, and attorneys. Topics will include filing a civil case, judgments and taxation of costs, orders and appeals, use of the audio-video unit, the Interpreters Act, records maintenance, and domestic and foreign service. For more information, call 212/791-9326.

SOURCE, from page 3

stitution. West, 1987.

Louis, Martin B. "Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion." 64 *North Carolina L. Rev.* 993 (1986).

Monkmeyer, Susan R. "The Decision to Appeal a Criminal Conviction: Bridging the Gap Between the Obligations of Trial and Appellate Counsel." 1986 *Wisconsin L. Rev.* 399.

Murchison, Brian C. "Moments of Silence in Administrative Law: Notes on Judicial Method in the Deregulation Cases." 60 *Tulane L. Rev.* 697 (1986).

1986 Grand and Petit Juror Service in United States District Courts. Administrative Office of the U.S. Courts, 1986.

Resnik, Judith. "The Declining Faith in the Adversary System." 15 *Litigation* 3 (Fall 1986).

Special Committee on Science and Law. "An Analysis of Proposed Changes in Substantive and Procedural Law in Response to Perceived Difficulties in Establishing Whether or Not Causation Exists in Mass Toxic Tort Litigation." 41 *Record of the Association of the Bar of the City of New York* 905 (1986).

Stathis, Stephen W. "Executive Cooperation: Presidential Recognition of the Investigative Authority of Congress and the Courts." 3 *J. of Law & Politics* 183 (1986).

Winters, Richard H. "An Intercircuit Panel of the United States Courts of Appeals: The Costs of Structural Change." 70 *Judicature* 31 (June/July 1986).

Zimring, Franklin E., & Hawkins, Gordon. "A Punishment in Search of a Crime: Standards for Capital Punishment in the Law of Criminal Homicide." 46 *Maryland L. Rev.* 115 (1986).

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THE THIRD BRANCH

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THE THIRD BRANCH

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Levin to Retire in July After Decade as FJC Director; Search Committee Appointed

Professor A. Leo Levin, director of the Federal Judicial Center, has announced that he will retire on July 31. At the time of his retirement, Professor Levin will have served as FJC director for more than a decade—over half of the Center's lifetime.

Professor Levin is the fourth director of the Center and was the first nonjudge to be selected for the position. He was preceded by Judge Walter E. Hoffman, Judge Alfred P. Murrah, and Justice Tom C. Clark.

A. Leo Levin

In his letter of resignation to the Chief Justice, Professor Levin noted that he has been asked to be the first incumbent of a new chair at the University of Pennsylvania Law School. He stated that "[S]erving in my present position has been an enriching and enjoyable experience. This has been true in large measure because of the assistance provided by so many judges and other members of the federal judicial system, including the Center's most impressive and dedicated staff. Most of all, I am deeply indebted to the members of the Center's Board, who have offered both help and friendship . . . . I believe that the Center is poised, under your leader-

See LEVIN, page 5

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Solicitor General Charles Fried Describes Role in Approval of Appeals, Supreme Court Cases

Solicitor General Charles Fried received his A.B. from Princeton University, bachelor's and master's degrees from Oxford University, and his LL.B. from Columbia University. He clerked for Justice John M. Harlan in 1960, then joined the Harvard Law School faculty, where he taught contracts and legal philosophy. He has served as a consultant to the Treasury Department, the White House Office of Policy Development, the Department of Transportation, and the Justice Department. He was appointed deputy solicitor general and counselor to the solicitor general in 1985, and was named solicitor general later the same year.

The solicitor general has been described as the representative of the government in the Supreme Court.

Do you take on other assignments, administrative or otherwise?

By our statutes and regulations we actually have another role which is very time-consuming: We have to approve all of the government's appeals in any court and all of its amicus filings in any appellate court.

Including 93 U.S. attorneys and their cases?

Yes, but just appeals, not their original filings—any appeal that the government takes, and that means any government agency, except some of the independent agencies which have independent litigating authority. In general, if the federal government loses a case, it cannot appeal unless my office—and that

See FRIED, page 6

Judicial Conference Elects Judges Kennedy, O'Kelley to FJC Board

Judges Anthony M. Kennedy (9th Cir.) and William Clark O'Kelley (N.D. Ga.) have been elected by the Judicial Conference of the U.S. to serve as members of the Board of the Federal Judicial Center. They replace Judge Daniel M. Friedman (Fed. Cir.) and Judge Howard C. Bratton (D.N.M.), respectively, each of whom has served as a Board member since March 1983. By statute, Board members serve four-year terms and cannot be re-elected.

Anthony M. Kennedy

Judge Kennedy, a native Californian, was appointed U.S. circuit judge for the Ninth Circuit in 1975. He received a B.A. degree from Stanford University, an LL.B. from Harvard, and attended the London School of Economics. Judge Kennedy is a member of the Judicial Conference Advisory Committee on Codes of Conduct and is chairman of the Committee on Pacific Territories.

William C. O'Kelley

Judge O'Kelley has been a district judge since 1970. He has served on

See BOARD, page 3

Chief Justice Speaks on Bicentennial, Justice Scalia on Federal Court System, at ABA Meeting

Chief Justice William H. Rehnquist addressed the American Bar Association's recent midyear meeting, reminding members of the legal profession of their obligations "to reflect on and speak about the significance" of the 200th anniversary of the signing of the U.S. Constitution.

In his first address to the ABA since becoming Chief Justice, he explained that he was not making a "state of the judiciary" report, but rather had elected to talk about the importance of observing the bicentennial.

The Chief Justice noted that "lawyers played a large part in the drafting of the Constitution and they have played an even larger part in its interpretation."

He stressed the importance of appreciating the value of "the flexibility of the substantive provisions" in the Constitution, which empower the courts to invalidate laws that do not conform to the Constitution, a protection that did not exist in England or in any European country 200 years ago. The important point is, he said, that the drafters of our Constitution recognized the importance of giving the judicial branch of our government "the final say as to how [the Constitution] should be interpreted." What we have today is a "finely tuned mechanism by which constitutional law is declared, interpreted, and on occasion changed, which is perhaps the greatest gift of the framers.... They realized that an independent judiciary was essential to give life to the conditional guarantees, and they provided for one. Dur-

See REHNQUIST, page 4

ABA House Favors Higher Diversity Jurisdiction Threshold; Approves Tort Law Resolutions

The following matters of interest to the federal judiciary were considered by the ABA House of Delegates during its recent midyear meeting:

Diversity jurisdiction. The House of Delegates approved a resolution recommending that 28 U.S.C. § 1332 be amended to provide that in diversity of citizenship cases the value of the amount in controversy must exceed $50,000. In 1789 the amount was set at $500; it was increased to $2,000 in 1887, to $3,000 in 1911, and to $10,000 in 1958. Proponents of abolishing diversity argued unsuccessfully that the amount should be much higher than $50,000, since inflation has made even the $50,000 amount unrealistic.

Tort reform. On Feb. 11, a 14-member commission of the ABA, after months of study, released an extensive report with 20 recommendations to improve the tort system in this country.

The House of Delegates accepted 18 of the commission's recommendations. The delegates voted against ceilings on the amount of money that tort-plaintiffs may recover for "pain and suffering," with a statement that "there should be no ceilings on pain and suffering damages, but instead ... the courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations." [See the report on S. 426, which would cap such awards, on p. 9.] The delegates

See ABA, page

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

200 Years Ago...

April 1787: Long a student of political science, James Madison readied himself for May and the Constitutional Convention by delving into works of political theory and histories of ancient and modern confederacies. Much of his reading came from books sent to him by his close friend Thomas Jefferson, then the American ambassador to France.

In April 1787, while in New York as a member of Congress, Madison's research bore fruit in an eleven-point memorandum on the "Vices of the Political System of the United States," prepared mainly for those likely to be influential at the Convention. "A sanction," he wrote, "is essential to the idea of law, as coercion is to that of Government. The federal system, being destitute of both, wants the great vital principles of a Political Constitution."

A letter the same month to Washington anticipated many of the proposals Madison would put forth in Philadelphia. He told Washington, for example, that the "national supremacy ought also to be extended ... to the Judiciary department.... It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local constitution, and that an appeal should lie to some National tribunal in all cases to which foreigners or inhabitants of other States may be parties. The admiralty jurisdiction seems to fall entirely within the purview of the national Government."

BICENTENNIAL OF THE U.S. CONSTITUTION

FJC Reports on Two Unusual Calendaring Practices in E.D.N.C.

The Center recently published *Calendaring Practices of the Eastern District of North Carolina*, a research report by Susan M. Olson, formerly a judicial fellow in the Center's Research Division.

The report describes two unusual calendaring procedures used by the Eastern District of North Carolina. The first involves civil cases, which are assigned randomly to the judges of the court who then travel among the court's divisions to try the cases. The second procedure involves calendaring of criminal cases, which are assigned for several consecutive months to a team of one judge and magistrate, who remain responsible for the cases until final disposition.

The court has adopted these procedures in the effort to achieve several goals: increasing the court's accessibility to the public, avoiding bias in decision making, and, more generally, ensuring sound and expeditious decision making. On the basis of interviews with judges, magistrates, clerks, and attorneys practicing in the district, the author discusses the essential features of the procedures and assesses their adaptability to other district courts.

Copies of the report can be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (5 oz.), but do not send an envelope.

OARD, from page 1

e Judicial Conference Committee
n the Administration of the Crimi-
l Law, and currently is a member
the Advisory Committee on Crimi-
l Rules. He was appointed to a
ven-year term as a judge on the
S. Foreign Intelligence Sur-
illance Court in May 1980. For
ee years, he was the district repre-
ntative to the Judicial Conference
m the Eleventh Circuit. ■

Judge Gignoux Selected as Recipient of Devitt Distinguished Service to Justice Award

Judge Edward T. Gignoux (D. Me.), a federal judge for almost 30 years, has been chosen to receive this year's Edward J. Devitt Distinguished Service to Justice Award.

Edward T. Gignoux

Judge Gignoux has for many years been associated with the work of improving judicial administration in the federal court system, mainly through the Judicial Conference of the United States. The judge has also made significant contributions to the work of state and national bar associations and is a member of the council of the American Law Institute.

Since joining the federal court system, Judge Gignoux has been a member of numerous Judicial Conference committees, whose work covered personnel, the jury system, bankruptcy, ethics, judicial conduct, judicial trial practice and technique, federal jurisdiction, and court administration. Currently the judge is chairman of the Judicial Conference Committee on Rules of Practice and Procedure, which, with its adjunct committees, is responsible for drafting all the national federal rules used in the federal courts—appellate, civil, criminal, and bankruptcy. The committee's aggregate membership is now 53. In addition, Judge Gignoux was for six years the First Circuit's district

See GIGNOUX, page 10

LEGISLATION

The following is a listing of some bills of interest to the judiciary that have been introduced in the 100th Congress. Committee action has not yet been taken on most of them.

• H.R. 742. Clarifies that the Supreme Court's amendment to Fed. R. Crim. P. 35(b) continues in effect until section 215(b) of the Comprehensive Crime Control Act of 1984 takes effect. The Supreme Court, pursuant to the Rules Enabling Act, on Apr. 29, 1985, ordered an amendment transmitted to Congress resolving an uncertainty as to whether a motion filed within the 120 days permitted by the rule also had to be ruled upon within that period. The Court's amendment required that the sentencing court determine a rule 35(b) motion "within a reasonable time" after the motion is filed. The Court's order making the amendment was to have been effective only until Nov. 1, 1986, when section 215(b) was to have gone into effect. (Section 215(b) abolishes both the defendant's ability to move to reduce sentence and the court's authority, sua sponte, to reduce sentence.) However, Congress

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Law Day—U.S.A.

May 1 is Law Day—U.S.A. This year's theme is "We the People." Law Day was conceived in 1957 by the American Bar Association and established by President Eisenhower by presidential proclamation in 1958. In 1961, May 1 was set aside for the observance of Law Day by joint resolution of Congress, and it continues to be presidentially proclaimed each year.

Larry Stoorza Leaves FJC Systems Division to Head AO's Automation and Statistics Operations

AO Director L. Ralph Mecham has announced the selection of Edwin L. ("Larry") Stoorza for the position of assistant director for automation and statistics. Mr. Stoorza was selected from a large number of applicants following a comprehensive recruiting effort. Director Mecham cited Mr. Stoorza's proven management talent, strong technical skills, and knowledge of federal court needs as important reasons for his selection.

Larry Stoorza

Mr. Stoorza currently serves as director of the FJC's Innovations and Systems Development Division. Both the Center and the AO have utilized his exceptional services in the design and, subsequently, the implementation of the new family of decentralized computer systems for appellate, district, and bankruptcy courts. Mr. Stoorza served as deputy director of the FJC's Systems Division from 1976 to 1981. He became chief of the AO's Systems Services Branch in 1981 and later became assistant director of Management Systems and Services. He rejoined the Center in 1986. His continued interest in the successful automation of the courts has benefitted both agencies, as well as the federal judiciary.

See STOORZA, page 8

REHNQUIST, from page 2

ing this year we, as lawyers, should be in the front ranks of those who are celebrating this great event."

Justice Scalia, also appearing before this group for the first time since taking office in September 1986, talked about his perceptions of the federal courts at the time he graduated from law school in 1960 and today. Justice Scalia cited statistics to support his statement that the federal courts today—with double caseloads and without a proportionate increase in judgeships—are facing serious problems that must be resolved if the federal judiciary is to function as our founding fathers intended.

The solutions, the Justice said, are not to be found solely in an increase in judgeships, in improved case processing procedures, or even in the adoption of the proposed intercircuit tribunal. Justice Scalia's suggestion to the bar membership and Congress was that they concentrate on meaningful structural changes. He suggested consideration be given to specialization through Article III tribunals (such as a national Social Security court); diversion of matters such as freedom of information requests from the courts to administrative law judges (with appeal to the federal courts only on issues of law and then only if the administrative law judge's decision is reversed by an agency); and elimination of diversity jurisdiction cases or, at a minimum, a substantial increase in the amount in controversy requirement.

He warned that if the trend in the federal court system continues as it already has for more than a quarter of a century, it will create a "nationalization of our legal system, ... a vast judicial bureaucracy, and it will inevitably [bring to the federal bench less than superior] personnel to match.... The question is not whether the federal courts should be changed, but rather whether that change, through inaction, will take the form of continuing deterioration or whether some structural alteration will preserve the essence of a valuable institution."

[Copies of the addresses of Chief Justice Rehnquist and Justice Scalia are available in the FJC's Information Services Office.]

Positions Available

Senior Staff Attorney, 1st Cir. Candidates should have 5 years' legal experience, strong academic credentials, management experience, and experience with appellate or federal courts. Salary from $53,830 to upper 60s, depending on experience and prior federal service, if any. Send resume and references by Apr. 13 to Dana H. Gallup, Circuit Executive, Rm. 1302, U.S. Post Office, Boston, MA 02109.

* * *

U.S. Bankruptcy Judges. Five new positions in the 11th Cir.: N.D. Ga. (2 at Atlanta), S.D. Ga. (1 at Augusta), M.D. Fla. (1 at Tampa, 1 at Orlando). Appointments will not be made to these new positions until Congress appropriates supplemental funds. Application available from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth St., Atlanta GA 30303. Completed application should be received by May 1.

* * *

Clerk, Bankruptcy Court (D.N.H.). Salary $45,762 to $59,491. Requires minimum of 10 years' progressively responsible administrative experience, at least 3 years in a position of substantial management responsibility. College and law degrees may be partially substituted for experience; law degree preferred. Submit resume or SF 171 by June 30, 1987, to Hon. James E. Yacos, Judge, U.S. Bankruptcy Court, Federal Bldg., 275 Chestnut St., Manchester, NH 03101.

* * *

Deputy Clerk (Automation Management), Fed. Cir. Salary to $27,172. Responsible for overseeing development and implementation of automated systems. Position open until filled. Minimum 5 years' experience; B.A., Masters, or J.D. degrees may be considered in relation to experience requirement. Submit SF 171 and resume to Francis X. Gindhart, Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

Nominations

Morton I. Greenberg, U.S. Circuit Judge, 3d Cir., Feb. 17

Joseph P. Stadtmueller, U.S. District Judge, E.D. Wis., Mar. 3

Robert H. Bell, U.S. District Judge, W.D. Mich., Mar. 11

Elevations

Clarence A. Brimmer, Chief Judge, D. Wyo., Jan. 17

Santiago E. Campos, Chief Judge, D.N.M., Feb. 5

Senior Status

Halbert O. Woodward, U.S. District Judge, N.D. Tex., Dec. 30

Robert L. Carter, U.S. District Judge, S.D.N.Y., Dec. 31

Joseph P. Kinneary, U.S. District Judge, S.D. Ohio, Dec. 31

James E. Noland, U.S. District Judge, S.D. Ind., Dec. 31

William E. Steckler, U.S. District Judge, S.D. Ind., Dec. 31

LEVIN, from page 1

ship, to reach new heights."

In a letter to Professor Levin, the Chief Justice wrote that he is "truly saddened" by the decision to retire as FJC director. "I know . . . that your performance as Director for ten years has been truly outstanding, and that you have made a lasting contribution to the work of the Center which will long survive your tenure as Director."

The Chief Justice has appointed a search committee consisting of Judge A. David Mazzone (D. Mass.), Chair, Judge John C. Godbold (11th Cir.), and Chief Judge William S. Sessions (W.D. Tex.) to assist in the selection of Professor Levin's successor. Judge Mazzone is a current member of the Center's Board and Judge Godbold and Chief Judge Sessions are former members of the Board. Requests for information should be directed to Judge A. David Mazzone, U.S. Court House, Boston, MA 02109. ■

Judicial Conference Certifies Consideration of Impeachment of Judge Hastings May Be Warranted

The Judicial Conference of the United States has certified to the Speaker of the House of Representatives that "consideration of impeachment may be warranted" in the matter of U.S. District Judge Alcee L. Hastings (S.D. Fla.). The certificate was signed by the Chief Justice on March 17, 1987.

The Judicial Conference had before it the Sept. 2, 1986, certification of the Judicial Council of the Eleventh Circuit that Judge Hastings "has engaged in conduct which might constitute grounds for impeachment." The Conference also had before it the report of the investigating committee appointed by the chief judge of the Eleventh Circuit and that committee's report, record, and exhibits, and a statement and report prepared by counsel for Judge Hastings filed with the Judicial Conference in response to the Conference's Sept. 17, 1986, invitation to Judge Hastings to submit a written response to the Eleventh Circuit's report (see *The Third Branch*, November 1986, p. 12). ■

NOTEWORTHY

Second Circuit issues report. Chief Judge Wilfred Feinberg (2nd Cir.) and Steven Flanders, circuit executive of the Second Circuit, have issued the eleventh Annual Report of the United States Courts for the Second Circuit, covering the statistical year ending June 30, 1986.

In 1986, the median processing time for civil cases in the Second Circuit was 6.0 months, and for criminal cases 5.5 months.

The district courts of the Second Circuit reported a 1 percent decrease in civil filings in 1986. The median time from filing to disposition in civil cases in the district courts of the circuit decreased by one month in 1986, from nine months to eight. Criminal case filings increased by 7.3 percent in 1986.

The report notes that "the largest source of regular business during the year was implementation of the Gramm–Rudman legislation."

Fifty-six misconduct complaints were filed with the clerk of the court of appeals pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act. Thirteen complaints were pending at the conclusion of the statistical year; no complaints were certified by the chief judge to a Committee on Judicial Conduct during the statistical year.

Three large responsibilities fell to the circuit executive's office for the first time in 1986: implementation of personal computer application throughout the circuit, telephone rental/purchase changeover, and numerous actions for and on behalf of the Judicial Council in connection with Gramm–Rudman–Hollings.

New reporting requirement for federal and state prosecutors. The Electronic Communications Privacy Act of 1986 became effective Jan. 20, 1987. The statute amends title III of the Omnibus Crime Control and Safe Streets Act of 1968 and results in a new reporting requirement for

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CALENDAR

Apr. 9–10 Frontline Leadership Management/Supervisory Training II

Apr. 20–22 Fifth Circuit Judicial Conference

Apr. 21–23 Regional Seminar for Probation and Pretrial Services Officers

Apr. 22–24 Workshop for Judges of the Fourth Circuit

Apr. 23–24 Frontline Leadership Management/Supervisory Training I

Apr. 27–May 1 Orientation Seminar for New Probation and Pretrial Services Officers

FRIED, from page 1

means in the end, I, authorize it.

What happens is that a recommendation for an appeal will be made to us by the U.S. attorney or by the relevant litigating division, and then a member of my staff will prepare an analysis and a deputy will review it. Then I will go over those memoranda and reach a decision. Mainly, the decision is favorable, although when appeal recommendations are approved, they are sometimes approved with qualifications. We say, "Don't make this argument," or "Make this argument this way rather than that way." We do that quite regularly. I think we are of some help to the lawyers by giving them suggestions and advice, and sometimes really specific instructions, on how the case is to be briefed in the appellate courts. And, of course, if they want to go en banc they need our approval. At that stage we turn them down more often. So, that's a lot of work. It does not leave time for other assignments.

A case comes to you through the divisions in the Department?

Yes. It would usually come to me through the divisions. Nevertheless, someone in my office will go through the whole file and I will study at least my office's recommendation; if they are in disagreement, I go through the whole file myself.

How large a staff do you have?

There are 22 lawyers.

Do you try to read all the opinions that come out of the circuits?

No. I read them if they are relevant to some case that I have, but not otherwise.

Do you confer with the White House on what cases to appeal?

I never have conferred with the White House. I think the system is that if the White House had a communication to make, that communication would be from the White House counsel, to the counselor to the Attorney General, and then to me. That's what Rex Lee told me the system was. But I have never heard from the White House—directly or indirectly. I have friends over there and I have had contacts at social lunches and engagements, but I have never had any business dealings with the White House at all. For a different relation, see the accounts of White House involvements in the solicitor general's positions in *Shelley v. Kraemer*, 100 Harv. L. Rev. 818–819 (1987), and *Regents v. Bakke* in Griffin Bell's *Taking Care of the Law*.

Charles Fried

What is your working relationship with Attorney General Meese? Do you arrive at a position to be taken on a given issue in a collegial way with his staff and your staff?

The relationship reflects the sort of man that he is and the sort of person I am. He is very interested in legal questions. He reads a lot. He likes to think about legal issues, and so do I. He enjoys conversation and give and take in discussion. In the course of a week, there is a morning staff meeting for all of his senior staff where things of interest are discussed. There is also a much smaller weekly luncheon where things of interest are discussed. He also has had conferences involving the leadership of the Department and outside academic speakers on issues of interest to the Department. These conferences have sometimes been weekend conferences where views are discussed. So there is a great deal of give and take. During that give and take, he certainly indicates his opinions about things, but because he is such an open and conversational person it is very clear that those expressions of opinion are just that—expressions of opinion.

The actual formal decision-making process is one which comes up from the divisions to me, and each person makes a decision. For example, the head of the Civil Division would make a formal recommendation which he would sign saying do this or do that; that would come to me, and I would study it and reach a decision. In the formal chain of command if somebody doesn't like my decision, they have the opportunity to carry an appeal to the Attorney General, because the statute indicates clearly that I am his subordinate, and he can then overrule my decision. So, he doesn't operate by giving me instructions to do things. He has, I hope, confidence in my judgment and he expects me to exercise that judgment, subject to being overruled; and that's exactly as it should be. The fact that he can overrule me is not anything that I consider threatening or disagreeable. I think, in fact it is a very important protection, because it would be quite wrong for me to have the final say in an ultimate legal sense, and yet it's very important for me to have the say that I do have by reaching an independent conclusion which then can be overruled. So that's the formal system.

Each administration has special interests in a given area. Do you try to make selections on the cases that you want to argue at the Supreme

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FRIED, from page 6

Court level, concentrating on certain issues?

Certainly that is an important element in deciding what cases to ask the Supreme Court to take. You have to have some criteria. Fortunately, the Supreme Court has its rules and they furnish a pretty fine filter which gets an awful lot of the "dead cats" out of there. In terms of what's left and then deciding whether, among the cases which meet the Supreme Court's stringent criteria, a particular case is worth taking—the fact that the issue is one of concern to the administration—is, of course, an important factor. Always has been and always will be.

How do you arrive at a decision on filing amicus curiae briefs?

We have to authorize every filing of an amicus brief in an appellate court anywhere in the country, including a state appellate court, if we feel that should be done. The initial impetus to file would come from some part of the government that had an interest in the case, and I would then have to authorize it. In Supreme Court cases, we would not only authorize it, we would actually brief and then argue the case.

Do you foresee going out into the federal courts of appeals to argue?

Occasionally one of our lawyers might argue an appeal in the courts of appeals, but that would be perhaps a younger lawyer who may need a little practice. I don't argue in the courts of appeals, because we have enough to do here.

How many of the amicus briefs that you have filed in the Supreme Court have been granted?

By a Supreme Court rule, every amicus brief that we file gets granted. So there's not a problem. We just file it and there it is. We do not need leave to file an amicus brief.

How about leave to participate in oral argument?

Argument is another thing because generally—almost invariably—you need to get time ceded by one of the parties, and the parties sometimes are not ready to give up their time. Even when they are, the Court may not want to allow divided argument. Generally they do. Sometimes they don't.

How do you feel about split arguments, if you have, for example, a total of 30 minutes?

I think you can get quite a lot said in 10 minutes. I have had some very good 10-minute arguments.

Were you litigating before you came here?

The first case I ever argued I argued in the Supreme Court, as a deputy, in February 1985 at the age of 50.

Do you have any pending state cases now?

I think we have one involving polio vaccine in Kansas. I think we've got a vaccine case in Ohio, and I think we've got a product liability case in California pending. There may be some others which I can't recall.

How many cases have you argued in the Supreme Court?

I have argued 14 cases.

You asked the Court to overrule *Roe v. Wade* in *Thornburgh v. American College of Obstetricians & Gynecologists*, a case in which none of the parties in the case had asked the Court to do that. This and other cases were seen as evidence that you had "politicized" the solicitor general's office. Recent press reports imply that you are now being more low-key in how far you are asking the Court to go in cases where you are participating as an amicus. Is this true?

The press loves to find trends and changes and so on. As far as I am concerned, I have not consciously adopted any different stance at all. The cases one goes into are a function of what's up there. The notion of politicizing the office is extremely ill-defined, and, if properly defined, is unfounded. If what "politicizing" the office means is using the office or the briefs for some kind of partisan political purposes, that's completely false. If what it means is that I have pointed out the proper direction which the law—constitutional law—and so on should take, then of course that is quite true. But then that's always been true. There has never been a solicitor general who was mindless enough not to have a view about the proper direction for the development of constitutional and other parts of the law, and that is something which we seek to express in our filings. If that is politicization of the office, then it is politicized. But I don't think there is anything the least bit new about it.

I think by and large the politicization claim comes from those who don't agree with the substantive positions. When Solicitor General Cox argued in the reapportionment cases, the usual suspects never said that he was politicizing the office, even though there was not a direct federal interest in the matter. I sus-

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"We have to authorize every filing of an amicus brief in an appellate court ... including a state appellate court."

"The first case I ever argued ... I argued in the Supreme Court."

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pect that's because they agreed with his substantive position. Philip Elman writes: "Truman's Gallup poll ratings at that time were very low.... Tom Clark was Attorney General, and both he and Perlman were political animals, very much aware of the Negro vote.... I don't know exactly what happened. Probably Tom Clark made the decision [to file in *Shelley v. Kraemer*] after checking with Truman." 100 Harv. L. Rev. 818 (1987). And Griffin Bell suggests that the solicitor general's position in the *Bakke* case was in part directed by Vice President Mondale. That's a kind of politicization I have never experienced or participated in.

What do you think of the latest law school graduates?

I am heartened by the quality of the graduates one sees. They are very excellent people, whom I enjoy interviewing. We have no dearth of applicants. We don't have any vacancies,

Charles Fried

but we have wonderful applicants. I am less encouraged by the writing that I see appearing in the law reviews.

They aren't good writers?

I don't mean the quality of the prose. The contents trouble me a bit. ■

Final Hearings Held on Revised Guidelines

NEWS FROM THE SENTENCING COMMISSION

Members of the Judicial Conference Committee on the Administration of the Probation System, as well as federal defenders, U.S. probation officers, and representatives from the Department of Justice and numerous other federal criminal justice system organizations testified at the U.S. Sentencing Commission's public hearings Mar. 11 and 12. These hearings capped the public comment period for the commission's Revised Draft Sentencing Guidelines.

The commission has already received many comments since the draft sentencing guidelines were published in the Feb. 6 *Federal Register* and distributed to over 5,000 individuals and groups.

By statute, the commission's initial set of guidelines are to be sent to Congress by Apr. 13. They will take effect Nov. 1 unless legislation is enacted changing or disapproving them, or delaying their effective date. ■

STOORZA, from page 4

In commenting on his selection, Mr. Stoorza said that he had thoroughly enjoyed his tenure with the Judicial Center and was convinced that the experience he gained would allow him to manage effectively the widespread installation of Center-developed software applications into the nationwide federal courts.

A native Texan, Mr. Stoorza is a graduate of the University of Oklahoma and holds the rank of captain in the U.S. Naval Reserve. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Brennan, William J., Jr. "Constitutional Adjudication and the Death Penalty: A View from the Court." 100 *Harvard L. Rev.* 313 (1986).

Burger, Warren E., Carl McGowan, George E. MacKinnon, *et al.* "Tribute to Edward Allen Tamm." 74 *Georgetown L.J.* 1571 (1986).

Feinberg, Wilfred. "Unique Customs and Practices of the Second Circuit." 14 *Hofstra L. Rev.* 297 (1986).

Flanders, Steven. "What Do the Federal Courts Do?" 5 *Rev. of Litigation* 199 (1986).

Higginbotham, Patrick E. "Judicial Attitudes: Pylons for the Advocate." 5 *Rev. of Litigation* 181 (1986).

Leval, Pierre N. "Dedication to Henry J. Friendly—In Memory of a Great Man." 52 *Brooklyn L. Rev.* 571 (1986).

McGowan, Carl. "The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System." 23 *San Diego L. Rev.* 791 (1986).

Mikva, Abner J. "How Should the Courts Treat Administrative Agencies?" 36 *American University L. Rev.* 1 (1986).

Posner, Richard A. "Law and Literature: A Relation Reargued." 72 *Virginia L. Rev.* 1351 (1986).

√ Rehnquist, William H. "The Many Faces of the Bicentennial." Remarks Before the ABA, New Orleans, La., Feb. 15, 1987.

√ Scalia, Antonin. Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La., Feb. 15, 1987.

Smith, Loren A. "A Vision of the Exchange." 27 *William & Mary L. Rev.* 767 (1986).

Stevens, John Paul. "The Third Branch of Liberty." 41 *University of Miami L. Rev.* 227 (1986).

Warriner, D. Dortch. "Of Laws, Men and Judges." 20 *University of Richmond L. Rev.* 451 (1986).

LEGISLATION, from page 3

delayed the effective date of section 215(b) until Nov. 1, 1987. Rep. John Conyers, Jr. (D-Mich.) introduced his bill "in hopes of foreclosing any ... litigation" over whether the Court's order continues in effect until Nov. 1, 1987.

• H.R. 938, sponsored by Rep. Norman D. Shumway (R-Cal.), would abolish the Legal Services Corp.

• S. 464. Sen. Alan Cranston (D-Cal.) sponsored this bill to amend the 1964 Civil Rights Act to prohibit discrimination on the basis of affectional or sexual orientation.

• S. 426, the Liability Insurance Reform Act of 1987, was introduced by Sen. Claiborne Pell (D-R.I.). The bill would cap pain and suffering awards at $250,000 and would mandate a staggered payment method for awards over $250,000 instead of the current lump-sum payment system. [See the ABA's recommendation against capping such awards reported on p. 2.] In addition, the bill would place a schedule system on contingency fees. This scale would allow an attorney to receive 33⅓ percent of the first $250,000 of an award; 25 percent of the amount from $250,000 to $1 million; and 20 percent of award amounts over $1 million.

• H.R. 635, the Product Liability Voluntary Claims and Uniform Standards Act of 1986, is sponsored by Rep. William E. Dannemeyer (R-Cal.). This bill would preempt conflicting state law and provide for uniform standards of liability. The most salient features of the bill include elimination of joint and several liability in favor of comparative responsibility, a cap on punitive damages to two times the amount of economic damages or $100,000, whichever is less, settlement incentives, and an alternative dispute resolution mechanism.

• S. 260, the Reform of Federal Intervention in State Proceedings Act, as introduced by Sen. Strom Thurmond (R-S.C.). The measure is intended by its sponsors to clarify in habeas corpus cases the standard of review, the effect of prior procedural defaults, time limits for bringing petitions, and the extent to which state remedies must first be exhausted.

• Representative Dan Glickman (D-Kan.) introduced, and the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations marked up, H.R. 1162, dealing with multiple appeals to the courts of appeals—the so-called "race to the courthouse" (see the *Third Branch*, January 1987, p. 7).

• The director of the Office of Management and Budget has sent to the Speaker of the House and to the Senate a letter transmitting a draft of proposed legislation to terminate the State Justice Institute. The State Justice Institute board was sworn in in 1986 and the institute is functioning this fiscal year with a budget of $7.2 million. ■

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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Administrative Office of the
United States Courts

Federal Judicial Center
A. Leo Levin, Director
Charles W. Nihan, Deputy Director

ABA, from page 2

did approve, after considerable debate, a recommendation that relates to the issue of punitive damages. They agreed that punitive damages "have a place in appropriate cases and should not be abolished," but the scope of the damages should be limited to cases where the standard of proof to be applied should be "clear and convincing" as opposed to "preponderance of the evidence." The resolution cautioned that the courts should closely scrutinize awards and the net worth of defendants in order to stem the tide of excessive punitive damage awards.

Injunctive relief, judicial officers. The delegates approved a resolution from the ABA Appellate Judges' Conference to ask Congress to amend 42 U.S.C. §§ 1983 and 1988 to prohibit the award of injunctive relief against any judicial officer for an act committed in his or her capacity as a judicial officer and not clearly in excess of the officer's jurisdiction unless a declaratory judgment was ignored, violated, or unavailable. The resolution included a prohibition on counsel fees.

Fed. R. Crim. P. 35(b) (Reduction of sentence by a federal judge). A resolution to ask Congress to retain this rule was approved. The revised draft guidelines proposed by the U.S. Sentencing Commission would vitiate this rule. [For a related story, see the report on H.R. 742 on p. 3.]

Money laundering. A resolution was approved urging that Congress amend the Money Laundering Control Act of 1986 to exempt provisions of the law that now call for an attorney to forfeit funds accepted from a client who is subject to criminal investigation.

Civil RICO Act. The House of Delegates approved asking Congress to amend 18 U.S.C. §§ 1961–1968 to limit the availability of a private civil action under the act. Seven ABA groups joined in requesting this resolution. ■

NOTEWORTHY, from page 5

federal and state prosecuting officials.

The new requirement applies only with respect to court orders or extensions entered on or after Jan. 20, 1987. 18 U.S.C. § 2519(1)(b) now requires prosecuting officials to report to the AO whether the order denying or approving intercepted wire, oral, or electronic communications was an ordinary specificity order, which requires a particular description of the type and location of the intercept device, or was a relaxed specificity order (roving tap), which allows a less explicit description. Until such time as the states pass legislation in conformance with the federal statute that provides for roving interceptions, all state intercept orders will be "ordinary" orders.

Ruling on suspension of jury trials not vacated. The Ninth Circuit rejected a Justice Department request to vacate a June 1986 ruling that the suspension of federal civil jury trials would violate the Seventh Amendment. The Justice Department argued that the ruling became moot when Congress appropriated supplemental funding for juror fees. (See *The Third Branch*, August 1986, p. 2.) The Ninth Circuit declined to find the case moot, and also found applicable an exception to the mootness doctrine for cases involving a voluntary cessation of unlawful conduct that is likely to recur. *Armster v. United States District Court*, 806 F.2d 1347 (9th Cir. 1986).

Second Circuit construes 1978 Jury System Improvements Act. The Second Circuit recently held that Congress did not intend that compensatory damages be awarded in actions brought under the 1978 Jury System Improvements Act. An aggrieved employee-juror maintained that the "other benefits" and "other appropriate relief" allowed by the statute should permit the recovery of compensatory damages for mental pain and suffering. The Second Circuit disagreed, finding no congressional intent in the statute to provide compensatory damages. *Shea v. County of Rockland*, No. 86-7747, Jan. 21, 1987. The statute at issue, 28 U.S.C. § 1875, provides that no employer shall discharge, threaten, intimidate, or coerce any permanent employee by reason of such employee's jury service, and that an employer violating the statute shall be liable for damages for lost wages or "other benefits" and may be ordered to provide other "appropriate relief." ■

GIGNOUX, from page 3

representative to the Judicial Conference.

Since 1980, the judge has been a member of the Temporary Emergency Court of Appeals.

Judge Gignoux was appointed U.S. district judge for the District of Maine in 1957 and served as chief judge from Nov. 8, 1978, to June 1, 1983, when he took senior status. He is a graduate of Harvard Law School and served as a lieutenant in the U.S. Army. He was separated from the service in 1946.

The Devitt Award has been presented annually by West Publishing Co. since 1982 to recognize extraordinary service to justice performed by a federal judge. The selection is made by a three-member committee, which this year was Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Edward J. Devitt (D. Minn.), for whom the award is named. Previous winners are Chief Justice Warren E. Burger and Judges Albert B. Maris (3d Cir.), Walter E. Hoffman (E.D. Va.), Frank M. Johnson (11th Cir.), and William J. Campbell (N.D. Ill.). The award was given posthumously to Judge Edward A. Tamm (D.C. Cir.) in 1986. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Sentencing, Salary Resolutions Passed by Judicial Conference

The Judicial Conference of the United States has authorized its Ad Hoc Committee on Sentencing Guidelines to recommend appropriate Conference positions to the Conference's Executive Committee following promulgation of the sentencing guidelines by the Sentencing Commission. The Ad Hoc Committee was also asked to recommend whether, in light of substantial judicial branch opposition to the guidelines, the Judicial Conference should recommend that Congress repeal the statute creating the Sentencing Commission and requiring sentencing guidelines. The

See CONFERENCE, page 7

Inside:
Special Report on the Sentencing Commission's Guidelines

A special report on the Sentencing Commission's *Sentencing Guidelines and Policy Statements for the Federal Courts*, as submitted Apr. 13 to Senate President Bush and House Speaker Wright, begins inside on page 3.

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A Message from the Chief Justice

The committee appointed to study the Judicial Conference and its committees has been hard at work since we first met last December at the Supreme Court. It was agreed then that the committee members would contact the judges in all of the circuits to obtain their views concerning possible improvements that should be made in the operations of the Conference, its committees, its subcommittees, and in the staff support to the Conference. Others in the judicial family also were asked for their views. Many responded, and I thank all those who took the time to assist us in our efforts to improve judicial governance.

The views of those who responded were presented to the full committee at our meeting last February in Phoenix. An interesting generalization emerged from the reports from the committee members. Those who are or have been chairmen or committee members feel that the system works reasonably well although it can be improved. Those who have not served tend to be more critical and at times suspicious. It is already evident, therefore, that there must be better communication of Conference deliberations and actions throughout the judiciary and that participation can be broadened.

Our next meeting will be held on May 5 at the Supreme Court. Each committee member will present detailed reports on the area to which each of them is assigned, ranging from a mission statement for the overall operations of the Conference, to terms of office, eligibility to serve, composition, and jurisdiction of Conference committees. I am well impressed with the dedication so evident in the response from each of the committee members. They have more than enough to do in their judicial pursuits but recognize the importance of the judicial governance role statutorily assigned to the Conference. The committee members are Hon. Levin H. Campbell, Hon. Wilfred Feinberg, Hon. Charles Clark, Hon. James R. Browning, Hon. Aubrey E. Robinson, Hon. John F. Nangle, Hon. Barbara B. Crabb, and Circuit Executive James A. Higgins.

It has been my pleasure to chair the committee meetings. The executive secretariat function is performed by Ralph Mecham, director of the Administrative Office, and Marion Ott, of his staff.

The goal of the committee is to present recommendations for the consideration of the full Conference in September 1987. Decisions made at that time will be implemented soon thereafter.

William H. Rehnquist

Subcommittee Chairman Weighs Court Issues, Immigration Problems

Romano L. Mazzoli has represented the congressional district that includes his native Louisville since 1971. He received a B.S. at the University of Notre Dame and a J.D. at the University of Louisville. After being admitted to the Kentucky bar, he practiced law and served in the Kentucky Senate (1967–70). He is chairman of the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law.

The Supreme Court's decision in *Cardoza-Fonseca v. Immigration & Naturalization Service* holds that the "well-founded fear" standard to be applied in asylum cases is more generous than the "clear probability of persecution" standard that the Board of Immigration Appeals sought to apply. Do you agree with predictions of a major increase in such cases following the decision?

Romano L. Mazzoli

It is very hard to say if there will be a major increase in the number of cases that the courts will hear with respect to the question of the standard an applicant would have to reach in order to be granted asylum. But certainly the cases which have been decided under the old clear probability of persecution standard for deciding whether the individual should be returned to his or her country will have to be examined. Many of them will be reexamined, and, of course, all the new cases will come up under the more relaxed standard of "well-founded fear." So it is hard to quantify the numbers, but I do think that this will add additional workload to the Immigra-

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LEGISLATION

The following items of interest to the judiciary are pending in Congress:

- AO Director Ralph Mecham has sent to the Congress a draft of proposed legislation to provide enhanced retirement credit for U.S. magistrates under the Civil Service Retirement System and also separate legislation to establish a new retirement program for bankruptcy judges and magistrates.
- H.R. 1162, the "race to the courthouse bill" (see *The Third Branch*, April 1987, p. 9) has been ordered reported to the full House by the Judiciary Committee.
- Rep. Thomas J. Tauke (R-Iowa) introduced H.R. 1666, a bill to establish the Social Security Administration as an independent agency, to reform the appeals process, and to establish a Social Security court. The Social Security court would be a specialized court separate from the judicial branch. Social Security Administration law and regulations would be binding on it, and it would not have jurisdiction to rule on constitutional matters or the validity of regulations. Federal district courts would retain jurisdiction of

See LEGISLATION, page 12

Data Show Significant Savings Resulting From Improvements in Juror Utilization

Juror utilization rates have improved in recent years, resulting in a total savings of $730,000 for the past two-year period and lessening the inconvenience to numerous potential jurors, according to data on first-day petit juror usage maintained by the AO. A series of juror management and utilization workshops jointly developed by the FJC and AO, and sponsored by the FJC, contributed to the improved utilization rates and subsequent savings.

The AO's data reflect the percentage of jurors not selected, serving, or challenged (NSSC) on voir dire/orientation day. For the period January 1986 through December 1986, the national percentage of NSSC jurors on the first day of jury service declined by 2.41 percentage points, from 35.26 percent in the year ended December 1985 to 32.85 percent in the year ended December 1986. This decline represents a savings of $482,000, and equates to almost 10,000 potential jurors not being brought into the courthouse unnecessarily.

The Judicial Conference at its March 1984 session adopted a recommendation by the Committee on the Operation of the Jury System to encourage all courts to reduce the percentage of NSSC jurors on voir dire/orientation day to 30 percent. At that time, the national percentage of NSSC jurors was 36.50 percent. In recommending this goal, the committee stated that its primary concern was the inconvenience imposed on citizens called for jury service.

In response to the adoption of the 30 percent goal, the FJC and AO jointly developed the juror management and utilization workshops, which are sponsored by the FJC. Over the last two years, every court has been afforded at least one opportunity to have the chief judge or the judge's designee, the clerk, and the jury administrator attend a workshop. The workshops have been well received by all participants, and have already produced impressive results. Statistics for the past two-year period show that, in addition to the financial savings, almost 15,000 potential jurors were spared unnecessary appearances.

THE THIRD BRANCH

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200 Years Ago...

May 1787: Delegates to the Constitutional Convention drifted into Philadelphia, many lodging at the Indian Queen, where, reported Virginia's George Mason, "we are charged only twenty-five Pennsylvania currency per day."

On May 25, when a majority of states were finally represented, the convention chose George Washington to preside and adopted rules, including a rule that "nothing spoken in the House be printed, or otherwise published or communicated without leave."

Debate began May 29 when Virginia Governor Edmund Randolph, coached by James Madison, proposed a government differing sharply from the Articles of Conferation. It would "be paramount to the state constitutions," based on "the republican principle," and include separate executive, legislative, and judicial branches.

The Virginia Plan's "National Judiciary," sitting in "supreme" and "inferior tribunals," would be chosen by the national legislature, hold office "during good behaviour," and receive a salary "in which no increase or diminution shall be made so as to affect" incumbent judges. Its jurisdiction would include admiralty cases, "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony."

BICENTENNIAL OF THE U.S. CONSTITUTION

Special Report: Guidelines Go to Congress; August '88 Implementation Proposed

On Apr. 13, U.S. Sentencing Commission chairman William W. Wilkins, ., of the Fourth Circuit Court of Appeals submitted the commission's *entencing Guidelines and Policy State-ents for the Federal Courts* to Senate resident Bush and House Speaker Vright. The commission, which will istribute the guidelines more broad- after printing and binding, noted hat they are "an initial set of uidelines" and stressed that it sees he "guideline-writing process as evo- tionary." The commission, as a per- anent agency responsible for onitoring federal sentencing prac- es nationally, said that it will submit

NEWS FROM THE SENTENCING COMMISSION

odifications and revisions to Con- ess based on "continuing research, perience, and analysis."

The October 1984 Comprehensive rime Control Act authorized crea- n of the Sentencing Commission, hich consists of seven voting mem- rs, whom the President nominated September 1985, and two *ex officio* embers. The statute also prescribed e basic framework for the sentenc- g system in which the commission's idelines are to operate.

The commission issued two draft ts of guidelines in September and nuary for public review and com- nt. These April guidelines will be- me law Nov. 1, 1987, unless anged or delayed by statute.

The commission has recommended at Congress allow the guidelines to o into effect November 1, 1987, . . . t that Congress enact legislation aying implementation of the idelines . . . until August 1, 1988." atutory changes keyed to guideline plementation—such as the aboli- n of parole and appellate review of ntences—would also be delayed until Aug. 1. This delay, however, does require a statutory enactment. If Congress does not act before Nov. 1, federal courts must then start sentencing according to the guidelines' provisions—at least with respect to offenses committed after that effective date.

The commission proposed the delay to allow it to field-test the submitted guidelines prior to implementation. During the field tests, the commission would encourage judges to apply the guidelines to cases before them in addition to exercising their regular sentencing duties. The commission would provide the judges forms on which they could advise the commission of the results of these tests, along with problems and recommendations. It will use this information to prepare technical and substantive amendments, which it would submit to Congress in early 1988, to take effect on Aug. 1, 1988.

The commission noted that the delay would also allow additional time for the training of judges and probation officers, prosecutors, and defense counsel. The FJC committee on education related to the 1984 crime control legislation, chaired by Judge A. David Mazzone (D. Mass), has begun formulating training plans for judicial branch personnel.

Sentencing Table

The guidelines contain a Sentencing Table with 43 offense levels on the vertical axis and six categories of criminal history on the horizontal axis. Offenders in criminal history category 1 would likely have little or no criminal record, while those in category 6 would likely have extensive criminal histories.

The judge would find the applicable guideline sentencing range, which the table expresses in months of imprisonment, by determining the offense level and then reading across

See SENTENCING, page 4

Carlson to Retire; Quinlan Successor at Bureau of Prisons

Norman Carlson, director of the Bureau of Prisons since 1970, will retire July 3, and J. Michael Quinlan, a career employee in the Department of Justice, will become the Bureau's new director.

Norman Carlson

Mr. Carlson is a native of Iowa. He began his career in penology as a parole officer at Leavenworth, Kan., in 1957 and held a series of positions at the Bureau of Prisons in Washington from 1960 until 1970, including four years as executive assistant to former director James Bennett.

During Mr. Carlson's tenure as director, the number of federal prisons grew from 27 to 47, and the number of inmates increased from 20,200 to about 42,000. He presided over or encouraged many developments and improvements in prison administration, including the increased professionalism of the Bureau's staff, increased employment and training opportunities for prisoners, more prisons and better design of newly constructed prison facilities, and enhanced sharing of knowledge between the judiciary and the Bureau.

J. Michael Quinlan

Mr. Quinlan is a graduate of Fordham Law School, and holds a master

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the axis to the proper criminal history category. Offense level 4, for example, which could apply to an offender convicted of theft of $100 or less, prescribes a sentencing range of 0 to 4 months for an offender in criminal history category 1, and 6 to 12 months for an offender in criminal history category 6. Offense level 38, which could apply to an offender convicted of aircraft hijacking, prescribes a sentencing range of 235–293 months for offenders in criminal history category 1, and 360 months to life for offenders in both the 5th and 6th criminal history categories.

The commission began its determination of guideline ranges "by estimating the average sentences now being served within each category" and thus believes that "guideline sentences in many instances will approximate existing practice."

Determining Offense Levels

Base offense levels. Chapter 2, "Offense Conduct," prescribes the base offense levels for approximately 170 offenses—for example, "aggravated assault" (15), "criminal infringement of copyright" (6), "renting or managing a drug establishment" (16), "insider trading" (8), "obstruction of justice" (12), and "trafficking in a United States passport" (6).

A forthcoming statutory index will direct users to appropriate guideline offense sections. For cases where there is no guideline for a specific statute, the judge is directed to apply the most closely analogous guideline offense section.

Adjustments for specific offense characteristics. In addition to the "base offense levels," chapter 2 includes various "specific offense characteristics" with which to adjust base offense levels. For example, guideline 2E2.1 specifies a base offense level of 20 for "making, financing, or collecting an extortionate extension of credit" but directs increasing that base offense level by 5 levels if a firearm was discharged, by 4 levels if a firearm or other dangerous weapon was "otherwise used," and by 3 levels if a firearm or other weapon was in the offender's possession.

Unlike the commission's January 1987 draft guidelines, the submitted guidelines contain no ranges for specific offense characteristics. For example, with respect to "larceny, embezzlement, and other forms of theft," the January draft directed the judge to increase the offense level "by 1 to 3 levels, depending upon the degree of planning and sophistication." The submitted guidelines, by contrast, provide a single number: "If the offense involved more than minimal planning, increase by 2 levels."

Other adjustments. Chapter 3 of the guidelines include a series of other adjustments.

Part A includes three adjustments—vulnerable victim, official victim, and restraint of victim—that are to be treated as specific offense characteristics and applied to any relevant offense unless the offense guideline in chapter 2 "incorporates these factors either in the base offense level or as a specific offense characteristic." The "official victim" guideline, for example, directs an increase of 3 levels if the victim was a law enforcement or corrections officer or any one of numerous public officials or their family members "and the crime was motivated by such status."

Chapter 3 also provides adjustments for "role in the offense," "obstruction," "multiple counts," and "acceptance of responsibility."

Determining Criminal History

The Sentencing Table expresses offense characteristics in levels, but it expresses criminal history in points. Chapter 4 assigns points for five items, three relating to prior sentence and two relating to sentencing status when the offense was committed. The judge is instructed, for example, to add 3 points for each prior sentence of imprisonment exceeding one year and one month. The total points for these five items translate into the offender's criminal history category for the table.

The commission noted empirical research on the correlations between various offender characteristics and recidivism but stated it "has made no definitive judgment in respect to the reliability of the presently existing data" and "will review further data insofar as it becomes available in the future."

Other Issues

Several issues have pervaded discussion and comment on the commission's September and January draft guidelines and will no doubt be scrutinized in the guidelines as submitted. They include:

"Real offense sentencing" versus "charge offense sentencing." The commission's September draft guidelines embodied a "modified real offense system," which based sentences on charged and some uncharged behavior. In the submitted guidelines, the commission has "moved closer to

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CALENDAR

June 1–5 Orientation for New Probation and Pretrial Services Officers
June 3–5 Regional Substance Abuse and Treatment Seminar
June 3–6 Sixth Circuit Judicial Conference
June 8–9 Judicial Conference Subcommittee on Judicial Statistics
June 8–14 Residential Week—Fordham Master's Program
June 15–16 Judicial Conference Subcommittee on Federal Jurisdiction
June 15–16 Judicial Conference Subcommittee on Federal-State Relations
June 25–27 Fourth Circuit Judicial Conference
June 29–30 Judicial Conference Advisory Committee on Civil Rules
June 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

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n 'charge offense' system" but has re-tained what it calls "a number of real elements." It notes, for example, that the guidelines often describe generic conduct (such as "aggravated assault") because of "the hundreds of overlap-ping and duplicative statutory provi-sions that make up the federal crimi-nal law." Also, through specific of-ense characteristics and adjust-ments, the guidelines take into ac-ount "a number of important, com-monly occurring real offense ele-ments such as role in the offense, the resence of a gun, or the amount of money actually taken."

Moreover, real offense behavior is onsidered "in the case of conviction y plea of guilty or *nolo contendere* con-aining a stipulation that specifically stablishes a more serious offense han the offense of conviction." Addi-onally, the guidelines contain a "rel-vant conduct" guideline (202), which ates that "to determine the se-ousness of the offense conduct," the dge shall take into account "all con-uct, circumstances, and injuries rele-nt to the offense of conviction."

Departures from the guidelines. Con-ess has provided that the court may epart from the guidelines when it nds "an aggravating or mitigating rcumstance" that the commission d not "adequately" consider. In its pening chapter, the commission ated its intention that courts "treat ch guideline as carving out a 'heart-nd,' a set of typical cases embodying e conduct that each guideline de-ribes." A court may consider nether to depart from the guidelines nen it "finds an atypical case, one to nich a particular guideline lin-istically applies but where conduct nificantly differs from the norm." Except for a few specific exceptions amely, race, sex, national origin, ed, religion, socio-economic sta-; drug dependence or alcohol use; d personal or business financial dif-ulties), "the commission does not end to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case."

The commission, however, avers its belief "that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."

Multicount convictions. This issue was not addressed in the two draft guideline documents. In the submitted guidelines, "fungible items," such as separate drug transactions or thefts of money, are aggregated across conviction offenses, and the guidelines apply to the total amount. In other kinds of multiple count cases, the guidelines provide for adding one to five offense levels to that for the most serious count, depending on offense seriousness and the distinctiveness of the harm caused.

Probation. Probation is available when the minimum term of imprisonment in the guideline range is zero. The guidelines also authorize probation when the minimum term of imprisonment in the guideline range is at least one but not more than six months, provided that community confinement is substituted for the minimum term specified. A provision new to the submitted guidelines provides that when the minimum term of imprisonment is at least one month but not more than ten months, the minimum term can be satisfied by a sentence of imprisonment of at least one-half the minimum term of imprisonment, providing that the remainder of the minimum term of imprisonment is served in community confinement as a condition of supervised release.

Plea agreements. The commission states in chapter 1 that it has not sought in these initial guidelines to "make significant changes in current plea agreement practices" and notes that the "court will accept or reject any such agreements primarily in accordance with . . . Fed. R. Crim. P. 11(e)."

Guideline 6B1.2 allows the court to

See SENTENCING, page 6

Federal Rules Amendments to Become Effective

Absent further congressional action, amendments to the Federal Rules of Civil and Criminal Procedure will become effective on Aug. 1, 1987, and amendments to the Federal Rules of Evidence will become effective on Oct. 1, 1987. The amendments were approved by the Supreme Court and transmitted by the Chief Justice to Congress in March.

The Supreme Court announced amendments to the bankruptcy rules on Mar. 30 and authorized their transmittal to Congress. The amendments to the bankruptcy rules will take effect Aug. 1, 1987, absent further congressional action.

PERSONNEL

Nominations

Royce C. Lamberth, U.S. District Judge, D.D.C., Mar. 19

Susan W. Liebeler, U.S. Circuit Judge, Fed. Cir., Mar. 23

Suzanne B. Conlon, U.S. District Judge, N.D. Ill., Apr. 2

Confirmations

Morton I. Greenberg, U.S. Circuit Judge, 3rd Cir., Mar. 20

Edward Leavy, U.S. Circuit Judge, 9th Cir., Mar. 20

Malcolm F. Marsh, U.S. District Judge, D. Or., Mar. 20

1986 Financial Disclosure Statements Due in May

All judicial officers and judicial employees in Grade 16 and above, including court reporters whose gross receipts plus regular salaries equaled or exceeded $61,296, are reminded that they are required to file a financial disclosure statement for calendar year 1986 by May 15. This includes those employees who may have only worked up to 60 days during 1986.

Annual filings are required by the Ethics in Government Act, 28 U.S.C.A. app. §§ 301–309 (Supp. 1987).

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accept a plea agreement including a charge dismissal or agreement not to pursue a charge if the court determines, on the record, that the remaining charges accurately reflect the seriousness of the actual offense behavior and that acceptance will not undermine the statutory purposes of sentencing.

It also allows the court to accept a recommended sentence, or a specific sentence agreement, if it is satisfied that the sentence is within the applicable guideline range or "departs from the applicable guideline range for justifiable reasons."

Fines. The guidelines provide that unless the offender establishes inability to pay or that payment would unduly burden dependents, "the court shall impose a fine in all cases" and "impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered."

Further Information

When it distributes the printed and bound guidelines, the commission will submit a report to Congress further explaining its recommendations, the projected impact of the guidelines on correctional facilities and services the operation of the guidelines ir comparison with current sentencing practices, and other relevant supporting information.

Commission Vote

As required by 28 U.S.C. § 994(a), the guidelines were approved by affirmative vote of a majority of the commission's seven voting members. Commissioner Paul H. Robinson voted in the negative and will submit a written dissent. Commissioner Ronald L. Gainer, a nonvoting, *ex officio* member from the Department of Justice, stated that if he were a voting commissioner, as a personal matter, he would not have voted to support the guidelines in their current form.

Fennell Named New Director of Center's Innovations & Systems Development Division

FJC Director A. Leo Levin has announced that Richard Fennell has been named director of the Center's Innovations and Systems Development Division. Dr. Fennell has served as deputy director of that division since 1981, and as its acting director since March 1987, when the previous director, Larry Stoorza, joined the Administrative Office as assistant director for automation and statistics (see *The Third Branch*, April 1987, p. 4). From 1975 to 1981, he served the division as a senior research computer scientist.

Richard Fennell

Dr. Fennell stated, "Until now, the primary recipients of the Center's automation efforts have been the clerks' offices of circuit, district, and bankruptcy courts. We are now preparing to transfer responsibility to the AO for the operational implementation and support of our latest generation of electronic docketing and case management systems. This transfer will provide the Systems Division with an opportunity to revert to a more research-oriented role and to undertake a range of technology assessment studies and experimental evaluations that have been requested by Judicial Conference committees, judges, and members of the court family. We intend to place particular emphasis on addressing the automation needs and concerns of judges and their in-chambers staffs. We hope these studies will enable the federal courts to take full advantage of state-of-the-art automation technologies."

Dr. Fennell is a graduate of Rennselaer Polytechnic Institute and holds a Ph.D. in computer science from Carnegie-Mellon University. He is the author and coauthor of numerous articles in professional journals.

Daniel Skoler, the director of the FJC's Continuing Education and Training Division, has announced that Steven Wolvek has been appointed deputy director of that division. Dr. Wolvek received his Ph.D. in sociology–criminology from UCLA, and came to the staff of the Center from the private sector in 1986. ■

NOTEWORTHY

Suit challenges pay raise mechanism. A suit challenging the legality of the mechanism that resulted in increased congressional and judicial salaries is pending in D.D.C. *Humphrey v. Baker*, No. 87-128. The plaintiffs include Sen. Gordon J. Humphrey (R-N.H.), five members of the House of Representatives, and Ralph Nader. The suit asks for a declaratory judgment that the procedures established by 2 U.S.C.A., ch. 11, for determining the compensation of senior federal officials are unconstitutional because they constitute an excessive delegation of the powers of Congress and violate the requirement of Art. I, § 6, that the compensation of members of Congress be "ascertained by law," and violate the separation of powers. In the alternative, plaintiffs seek a declaration that Congress properly disapproved the President's pay recommendations by means of a Senate resolution on Jan. 29, 1987, and a resolution in the House on Feb. 4, 1987.

Deductions of IRA contributions by petitioner judges allowed. Because judges are not "employees" as that term is used in section 219(b)(2)(A)(iv) of the Internal Revenue Code, they are not "qualified participants" in a plan established by the United States for its employees, and the Commissioner of Internal Revenue must allow them deductions for contributions to individual retirement accounts, the U.S. Tax Court has ruled. *Porter v. Commissioner of Internal Revenue*, 88 T.C. No. 2 (Mar. 5, 1987). ■

CONFERENCE, from page 1

Conference directed the Ad Hoc Committee to consult with the Committees on the Administration of the Criminal Law and the Probation System in making its recommendations.

In other business, the Conference also:

• Concurred in the determination of the Judicial Council of the Eleventh Circuit that consideration of the impeachment of Judge Alcee L. Hastings may be warranted and authorized the Chief Justice to certify to that effect to the Speaker of the House, as provided by 28 U.S.C. § 372(c)(8) (see *The Third Branch*, April 1987, p. 5).

• Endorsed "immediate" action by Congress to raise the salaries of bankruptcy judges and magistrates.

• Approved new salary classification schemes for clerks of court and chief probation and pretrial services officers.

• Reaffirmed, with minor amendments, the March 1982 Conference proposal on retirement of fixed-term judicial officers, whereby bankruptcy judges, magistrates, and territorial judges would receive a full annuity equal to the salary of office after 14 years of service, payable at age 65.

• Reaffirmed the Executive Committee's action raising bankruptcy noticing fees; approved increases in appellate, district court, Claims Court, and bankruptcy miscellaneous fees, *excluding* a proposal to establish a new fee for filing a suggestion for a rehearing en banc by a court of appeals; and recommended that Congress increase Claims Court filing fees from $60 to $120.

• Approved an amendment to the regulations governing the recall to service of retired bankruptcy judges. The amendment provides that when a retired bankruptcy judge is recalled to active service, the judicial council recalling the judge can certify that adequate support cannot be provided by existing resources, and the director of the Administrative Office may provide the necessary space, facilities, and equipment for the recalled judge.

• Adopted new regulations for the recall to service of retired magistrates, patterned on the Conference's regulations for bankruptcy judges.

• Approved increases in the salaries of law clerks and legal assistants, payable only if Congress appropriates the necessary additional funds.

• Authorized two pay increases for all part-time magistrates: the 3 percent cost-of-living adjustment recently granted to federal employees generally, retroactive to Jan. 1, and an increase proportionate to the 2.8 percent salary increase granted to full-time magistrates under the Federal Salary Act of 1967.

• Recommended that the circuit judicial councils and national courts substantially adopt on an experimental basis the *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* (see *The Third Branch*, November 1986, p. 8), and requested each judicial council and national court to report to the Court Administration Committee by September 1987 on its experience with local judicial discipline rules.

• Recommended that Congress abolish the Temporary Emergency Court of Appeals.

• Gave district court security committees the responsibility of designating "high-risk crime areas" for parking purposes.

• Urged Congress to act promptly to narrow significantly the scope of civil RICO actions, 18 U.S.C. § 1964(c).

• Urged Congress not to fund and to reconsider the National Childhood Vaccine Injury Act of 1986 [see Rep. Mazzoli's comments on the act, p. 11].

• Reiterated strong support for the State Justice Institute. ■

AO Appoints Karam Assistant Director For Administration

Raymond A. Karam has joined the Administrative Office to fill the newly created position of assistant director for administration, AO Director L. Ralph Mecham has announced.

Raymond A. Karam

Mr. Karam served as the acting assistant secretary at the U.S. Department of Transportation and, immediately prior to joining the AO, was deputy assistant secretary for budget and programs. Mr. Karam has worked in various key management positions at the Department of Transportation since February 1981. He has also served in the U.S. Department of the Interior, the Executive Office of the President, and the U.S. Air Force, and is a member of the Virginia bar. ■

Fed. Cir. Conference To Be Held on May 8

The Fifth Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit will be held in Washington, D.C., on May 8 from 9:00 to 5:00 at the Washington Hilton Hotel. Chief Judge Howard T. Markey will give the state of the court address, and Chief Justice Warren E. Burger will be the luncheon speaker.

There will be separate "breakout sessions" devoted to the Claims Court, Court of International Trade, Merit Systems Protection Board, and patents and trademarks.

It is expected that a total of 2,000 lawyers and judges will attend. ■

MAZZOLI, from page 1
tion & Naturalization Service and potentially to the courts thereafter. The work of the Subcommittee on Immigration is oversight, so we would expect at some point to have some opportunity to oversee exactly how this is being handled in practice once the new interpretation of "well-founded fear" becomes the standard.

H.R. 1120 would amend the Immigration and Nationality Act (INA) to provide religious sanctuary as a defense, in certain cases, to the criminal offense of harboring or transporting aliens. Does *Cardoza-Fonseca* affect the perceived need for this bill?

The subcommittee in the 100th Congress has not really organized yet, and I wouldn't have any way of knowing how all my colleagues feel, but I would think that there would not be a majority view that persons offering sanctuary, however laudable their goal and however noble their inspiration, should be somehow insulated from the law making it a crime intentionally to harbor an alien.

On the one hand, I think that, with respect to *Cardoza-Fonseca*, if, as we surmise, the new standard is somewhat looser and a little bit easier to attain, then it is possible that some of the very people who are now seeking a kind of sanctuary would be less likely to seek it because they would have a more proximate remedy in the handling of the asylum petition. On the other hand, I dispute to some extent whether or not everyone involved in the sanctuary movement is really complaining against the standards which are being applied in asylum cases. I think many of them are using this as a means to express their disaffection with overall government policy in Central America. So I am not sure whether or not *Cardoza-Fonseca* will have a direct effect on the sanctuary movement. It is possible, to the extent that it would provide a more likely remedy for asylum seekers. And that would lessen their need to go to the more radical solution of sanctuary.

Do you favor amending the INA so that aliens will no longer be excludable on ideological grounds?

Certainly those cases shock a person who reads about them—that advocating certain views, without advocating overthrow of the government or some harm to individuals, would qualify a person for exclusion or for deportation or for non-entry. My recollection is that in the 99th Congress, and possibly the 98th, we had hearings on the question of revamping all the 33 exclusions which are currently in the INA. Congressman Barney Frank has been very active in this and we do plan to have hearings this year. There are a lot of grounds, not just ideological views, that currently could exclude a person from becoming a legal resident or from entering the country for a visit, and those will all be examined.

"[W]e are probably not taking into the country through the legal immigration mechanism enough people with labor talents or with special skills and aptitudes."

Do you favor the creation of a specialized corps of asylum adjudicators separate from the Board of Immigration Appeals, as in some earlier versions of proposed immigration reform bills?

I do favor the creation of such a specialized corps. Unfortunately, in order to get a bill passed in the 99th Congress we had to drop that section from the draft, but it was put in, according to my recollection, in the 98th Congress or even the 97th, when the bill first began. I felt then, as I feel today, that some opportunity to have trained people make these findings and these adjudications would work for the benefit of the government as well as of the applicant. These people would be trained, they would have some knowledge of conditions in the country from which the applicant fled. These special adjudicators would have a kind of independence from government policy that in some cases maybe current examining officials don't have. We felt on the whole that this move would be a salutary move, but the practicalities overtook us. We had to drop it along with other sections in order to provide for the 99th Congress a sort of "slimmed-down" immigration reform bill. I wouldn't be at all surprised if the subcommittee takes another look at the possibility of changing the whole approach to the grant of asylum and to the question of who will hear these cases. So that may well be something for this or perhaps a succeeding Congress.

The Immigration Reform and Control Act of 1986 (IRCA) set up a special counsel's office in the Department of Justice, to handle claims of alleged discrimination in employment raised by "intending citizens." Some opposed this. How is this part of the IRCA working so far?

That's an interesting question because it relates to one of the core elements of our immigration reform bill: If the employer sanction section worked as we thought it would—which meant that employers could no longer with impunity hire people who don't have papers to work in this country—then there would have to be some mechanism to give legal protection to certain of the aliens in order that they might have their employment rights protected and in effect be protected against any unintended discrimination that could flow from the imposition of employer sanctions. This was a central element, highly controversial, passionately argued for and against. Today as we are taping this interview, I have just been served with the proposed regulations from the Justice Department which would flesh out the Office of Special Counsel. I have not frankly had a chance to go over them. Staff is supposed to brief me this after-

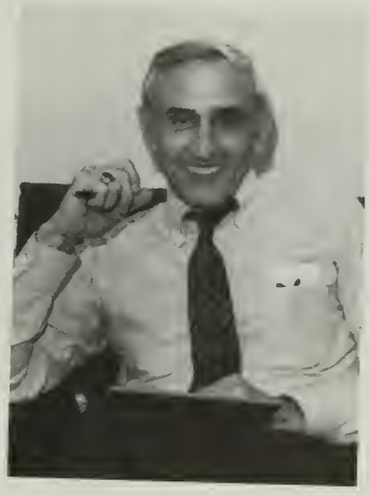
See MAZZOLI, page 9

MAZZOLI, from page 8

noon or tomorrow on them. We will have an oversight hearing in April with respect to all of the proposed regulations that have been issued. Not just for the Office of Special Counsel but for employer sanctions, legalization, the agricultural sections as well. And so I am very confident that whatever is in these regulations regarding the special counsel will be looked at with real scrutiny at that hearing and gone over with a fine-tooth comb. At this point they are not really in effect, and therefore we don't have any inkling of how they work, but we drafted the bill carefully with the help of Congressman Barney Frank, whose genius produced this, and we hope it will work as intended to protect the rights of the people who might somehow be the victims of some unintentional discrimination.

The IRCA dealt primarily with illegal immigration. But there is also a system of preferences for would-be legal immigrants. What are the prospects for legislation affecting issues in legal immigration?

We began last year in the 99th Congress with a few days of hearings on the whole question of legal immigration and what changes we should make in that category. I think that we can safely assume that we have now dealt in a pretty comprehensive fashion with illegal entry. And we had a very interesting series of hearings. We developed some information which was handled by our subcommittee staff and which itself will provide the matrix for further hearings in the 100th Congress. It is obviously controversial, because since 1965, when the last major change in the immigration laws took place, we have seen that certain parts of the world seem to have used up, in the process of reuniting their families, most of the total of 270,000 visas available annually for all of the six basic preference categories under the law.



Romano L. Mazzoli

The other day, under the 1986 immigration bill, some 10,000 visa numbers were made available to nations which have been somehow underrepresented since 1965, nations which in earlier eras of our country provided quite a few people—particularly western Europe. It was conducted as a lottery, and millions of pieces of mail came to the United States for those 10,000 visa numbers. This indicates that people around the world with talents, people with skills, people with imagination, people with visions of the future have a built-up, pent-up feeling that their whole future lies in the United States. Not all of them are highly educated, but they want to work.

The "fifth preference" category permits the immigration of brothers and sisters of a petitioning U.S. citizen. There is such a backlog of fifth preference petitions that petitions filed 5 or 6 years ago are only now being acted on, and those filed today may take 10 to 12 years to be decided. Will this be changed?

Actually, the times you quote probably are a very conservative estimate. It is probable that some of these cases will not come up for *more* than 10 to 12 years, and you are probably talking about hundreds of thousands of people who are in those categories. But as I indicated, we will broaden our inquiry to take into consideration other questions on legal immigration too. For example, we are probably not taking into the country through the legal immigration mechanism enough people with labor talents or with special skills and aptitudes. Those categories are practically dried up by the family unifications; brothers, sisters, parents, children take most of the available 270,000 numbers that are provided for the six basic preference categories in the current legal immigration system. So we will examine questions of the fifth preference for brothers and sisters, but also go all across the gamut—family preferences as well as preferences dealing with labor, talent, investors, retirees, and all the various categories which currently seem to be basically non-factors under the current immigration law.

Some earlier immigration reform bills would have given the courts of appeals rather than the district courts jurisdiction over actions by aliens

See MAZZOLI, page 10

Immigration Law Study Published by FJC

Major Issues in Immigration Law, a monograph by Professor David A. Martin of the University of Virginia School of Law, has recently been published by the Center.

The monograph presents the major features of the relevant substantive and procedural law, highlighting the areas of controversy that judges are most likely to encounter. Among the topics discussed are the constitutional framework of the immigration laws, admission categories, grounds for exclusion and deportation, political asylum, and judicial review. The final chapter is devoted to the Immigration Reform and Control Act of 1986 and includes discussion of the amnesty provisions for aliens who have been in the United States illegally since Jan. 1, 1982, new employer sanctions, an antidiscrimination provision, and special provisions for agricultural workers.

Copies of the monograph can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (9 oz.), but do not send an envelope.

MAZZOLI, from page 9

seeking review of exclusion orders. Did you favor such a provision?

I still favor such a provision. I am not sure exactly whether it can be attained, but the feeling we had was in line with the reality of the situation. An exclusion case is when an individual is apprehended at the border. A deportation is when they are in the United States and are later apprehended. The current practice is that an excludable alien applies to the district court, where review proceeds according to the usual standards for habeas corpus. But in either a deportation or an exclusion case the individual usually is not detained. So a habeas corpus case is really sort of a legal fiction—the body is not really being detained. But that is the only way that the courts have found in this sophisticated, and somewhat convoluted, process to actually try the question of whether or not a person ought to be excluded. And we think the better forum is the circuit court, which currently hears the cases on deportation. I think all of these matters will probably be before the subcommittee for review as part of our oversight function.

The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of which you are a member, held hearings last Congress on H.R. 4341, concerning court-annexed arbitration. What are the prospects for such a bill in the 100th Congress?

Last Congress, H.R. 4341 was introduced by Congressman Kastenmeier, who is chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The bill would have extended and expanded the program of court-annexed arbitrations which are currently in some of the federal districts around the country. I support that approach. I think it was born of discussions held at the conferences which the Brookings Institution and the two judiciary committees of Congress and the Justice Department have held for the last 10 years on trying to find alternatives to traditional litigation to solve disputes. I would expect that Congressman Kastenmeier will reintroduce a bill similar to H.R. 4341, and since he is devoted to the idea of finding alternatives that he would push it, and I would certainly support him in that effort.

"It is almost an article of doctrinal faith in the minds of some lawyers that you have to have diversity on the books or you have lost a major pillar of jurisprudence. I respectfully disagree."

Meantime, I have introduced a piece of legislation, H.R. 1929, the Federal Courts Study Act, a sort of brainchild of Judge Clifford Wallace of the Ninth Circuit in California. Judge Wallace, at the behest of former Chief Justice Burger, made a long and painstaking study of ways to improve the administration of justice, including arbitration and other forms of settlement. Judge Wallace believes, and I concur, and I hope that the Congress will at some point, that a commission should be established with members appointed by the various branches of government to make a long study—a 10-year study with interim reports—on what the state of the law and justice and the courts will be in the year 2000 and thereafter. We might also have a little bit of a head start on trying to formulate methods by which we can avoid clogging the courts.

Do you favor legislation to eliminate diversity of citizenship as a basis of federal court jurisdiction?

Sometimes people say that is a litmus test of whether you are a lawyer or not: Do you favor abolishing diversity? Even though I am a lawyer, I do favor that. I have in the past and I still do. I realize some of the problems in abrupt, total dismantling of diversity. Congressman Kastenmeier has in the past couple of Congresses formulated alterations in the current diversity provision. Under that provision, about half of the cases tried before the federal courts are there because they involve matters between individuals who reside in different states, not because there is an actual federal question. And, of course, half of the courts' time is a tremendous amount of time.

Now the antecedents of diversity are well known to most lawyers. It was to protect against local bias, so that you had a chance to go to a federal court if you felt that locally you would be given somehow biased or unfavorable treatment. The state courts have improved by light years from what they used to be. They are as competent as the federal courts, and they are as objective and impartial as are the federal courts. And you just don't have that evidence of bias like you used to have. Now it may be that you have a more disciplined court setting in the federal courts. It could be you have certain rules of procedures in the federal courts that are better than they have in the states. But those can be changed and altered by various mechanisms, rather than loading

"[The National Childhood Vaccine Injury Act of 1986] was adopted by Congress without the kind of review that would be brought to it by the Judiciary Committee."

See MAZZOLI, page 11

MAZZOLI, from page 10

down the federal courts with hearing a lot of accident cases.

But having said that, I would expect that the degree of opposition would not be any less strong and passionate this time around than it has been for the last two or three Congresses. It is almost an article of doctrinal faith in the minds of some lawyers that you have to have diversity on the books or you have lost a major pillar of jurisprudence. I respectfully disagree, but I recognize that that will be the basic battleground, and so I expect that the question will come up again this year. I would be hesitant to predict exactly the outcome.

The National Childhood Vaccine Injury Act of 1986 was enacted without coming before the Judiciary Committee, although it sets up a compensation program that would, if funded, in effect be administered by the federal courts. As a member of the committee, what is your view of this program and of Reagan administration proposals to seek changes in it before it is funded?

The fact that a bill like this was adopted by Congress without the kind of review that would be brought to it by the Judiciary Committee is, of course, an argument in favor of having a constant sequential or joint referral of bills where they affect two or three committees. Somehow this one must have slipped through. I think that this argues on behalf of letting committees like the Committee on the Judiciary look at the bills as they come through, because we can offer certain suggestions with respect to the vaccine bill. Under it, people would go to the courts, which would administer this kind of no-fault payment situation by means of special masters. If the individuals involved are dissatisfied with the special master's decision, then of course they can appeal to the district courts and have a de novo trial. So you can have actually two shots here, which doubles the workload. This may be just another immense hurdle for the federal courts to surmount in order to try to become effective and handle their other litigation in a more timely fashion. So although I am not quite sure that the adminstration should come in and try to change a bill before it becomes effective, I do think that good-faith questions have been raised about whether or not it will work for the federal courts to become a kind of special master. I would expect, since this bill has not yet been funded, that before the program is started up we might have a review which might have some modifying changes.

"[T]hese calls to abolish the Legal Services Corporation come up just like the crocuses every spring and, just like the crocuses, pretty soon they lose their flowers and they go back into hiding."

What are your views on recent calls to abolish the Legal Services Corporation?

Well, these calls to abolish the Legal Services Corporation come up just like the crocuses every spring and, just like the crocuses, pretty soon they lose their flowers and they go back into hiding.

I would say that the LSC needs constantly to assess where it is going, because I have faulted it often in the past for getting too far afield from its real mission, which is to help the poor and the underprivileged and the people who don't have access to the courts of law. But they go off on these sometimes half-baked and fruitless efforts to upset the apple cart and change the course of human history, sometimes forgetting the people that most need their help. I have always supported the LSC in the past. I always voted for the money and I always shall intend to, but I do think that constant vigilance is needed to be sure that it stays alive.

You have been in Congress since 1971. What perspective has that given you on the work of the judiciary?

Judge Pierce Lively is a very dear friend of mine and a very respected member of the bench, not just in Kentucky but around the country. I probably had my first inkling of the challenges and also the rewards and the fulfillments of the bench from Pierce and from some members of the Sixth Circuit panels with whom I have visited over the years, including once at one of their conferences which took place in Nashville. I would say that I probably have higher respect for members of the federal bench than for just about anyone. I say that because of the training that it takes, because of the hard work—and it is hard work—and because of the ability they have to really secure for people the fulfillment of their rights and redress of their grievances.

I mentioned earlier the conferences held under the auspices of the Brookings Institution and of the two judiciary committees of Congress and the Justice Department and the court system, where in one room at one time can come people from the Chief Justice to freshman members of Congress to talk about the administration of justice and how to improve it—you come away from that with a very solid view of the federal bench. You see the kind of men and women who are appointed, and you see the need for Congress to provide them the tools they need—not just the dollars it takes, the clerks in the courtrooms, and the computers, but also the dispute resolution mechanisms that would allow them shortcuts to achieve justice with more economies and with less time consumed. So I think it means that Congress (and this member, because I serve on those committees) has a responsibility to stay very close to the subject and to be careful that we provide for the courts exactly what they need. ■

Position Available

Chief Probation Officer, E.D. Wis. Starts July 6, 1987. Salary to $69,976. Requirements include 4 years' experience in a helping profession, with 1 year's experience as supervisor; advanced degree in appropriate social science preferred. Send resume by May 29 to Sofron B. Nedilsky, Clerk, U.S. District Court, Eastern District of Wisconsin, 362 Federal Building, Milwaukee, WI 53202.

EQUAL OPPORTUNITY EMPLOYER

LEGISLATION, from page 2

constitutional issues and validity of regulations issues. As in the Tax Court, qualified nonattorneys could represent claimants upon certification by the special court, or claimants could represent themselves.

- The Senate Labor and Human Resources Committee held hearings on S. 557, the Civil Rights Restoration Act of 1987, which would broaden the coverage of certain civil rights statutes beyond their applicability as interpreted in the Supreme Court's *Grove City v. Bell* decision. In the House, Reps. F. James Sensenbrenner, Jr. (R-Wis.) and Charles W. Stenholm (D-Tex.) have introduced H.R. 1881, the Civil Rights Act of 1987, which would reverse the *Grove City* decision by making educational institutions and public school districts receiving any federal assistance subject to four existing civil rights statutes.
- H.R. 1333, introduced by Rep. Daniel E. Lungren (R-Cal.) would establish, with certain exceptions, a one-year statute of limitations period for the filing of habeas corpus petitions by state prisoners, which would run from the time of exhaustion of state remedies. Among the bill's other provisions, it would vest in appellate court judges the sole authority to issue certificates of probable cause for appeal in habeas corpus proceedings, and would allow federal courts to deny a habeas petition on the merits without requiring prior exhaustion of state remedies.
- Senator Arlen Specter (R-Pa.) introduced S. 824, the Torture Victims Protection Act of 1987, cosponsored by Sen. Patrick J. Leahy (D-Vt.). The bill would establish clearly a federal right of action by aliens and U.S. citizens against persons engaging in torture or extrajudicial killings in foreign countries. Only persons acting "under actual or apparent" governmental authority would be liable, and courts could decline jurisdiction over such suits if it were shown by "clear and convincing evidence" that the claimant had not exhausted "adequate and available remedies" in the nation where the alleged violations took place. ■

PRISONS, from page 3

of law degree from George Washington University. He joined the Bureau of Prisons as an attorney in 1971. In 1975, Mr. Quinlan was named executive assistant to Mr. Carlson, a position he held until 1978, when he was named superintendent at the Federal Prison Camp, Eglin Air Force Base, Fla. He became warden at the Federal Correctional Institution in Otisville, N.Y., in 1980, and became a deputy assistant director of the Bureau five years later. ■

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Chief Judge Sessions Discusses Federal Court Automation, Management

Chief Judge William S. Sessions has served in the Western District of Texas since December 1974, and has been chief judge since 1980. Judge Sessions was born in Arkansas and received his B.A. and LL.B. degrees from Baylor University. He was a section chief in the Criminal Division at the Department of Justice (1969–71) and U.S. Attorney for the Western District of Texas (1971–74). He currently chairs the Judicial Conference Subcommittee on Judicial Improvements, and has served on the Implementation Committee on Admission of Attorneys to Federal Practice and the Special Ad Hoc Court Reporters Study Committee. He is a former FJC Board member (1980–84).

William S. Sessions

Would you explain the work of the Subcommittee on Judicial Improvements, which is now made up of three circuit judges, two district judges, one bankruptcy judge, and one magistrate.

The subcommittee is one of five of the Committee on Court Administration of the Judicial Conference of the United States. It meets twice yearly, generally in May and December, and deals with matters referred to it by the Judicial Conference or the parent committee. These matters include such diverse items as automation, court security, court design, travel regulations for justices and judges, arbitration, places of holding court, legislation concerning United States mar-

See SESSIONS, page 6

Circuit Judge John C. Godbold Selected as Fifth Director of Federal Judicial Center

Circuit Judge John C. Godbold from Alabama, a judge of the U.S. Court of Appeals for the Eleventh Circuit, has been named the new director of the Federal Judicial Center.

John C. Godbold

Judge Godbold's appointment was announced by Chief Justice William H. Rehnquist, chairman of the Center's governing Board. In announcing that the Board had unanimously elected Judge Godbold, the Chief Justice said:

"We are very fortunate to have persuaded Judge Godbold to come to Washington to serve as the Center's director. He has been a distinguished and courageous jurist for over two decades. In addition, he has served with distinction as a circuit chief judge, a member of the Judicial Conference of the United States, and a member of the Center's Board."

Judge Godbold will succeed A. Leo Levin, who will retire on July 31 after more than a decade as the Center's director.

Judge Godbold, who lives in Montgomery, Alabama, was appointed judge of the U.S. Court of Appeals for the Fifth Circuit in 1966. He served as chief judge of that circuit for most of 1981, and later that year became the first chief judge of the newly created

See GODBOLD, page 3

D.C. Cir. and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement

The U.S. Claims Court and the U.S. Court of Appeals for the District of Columbia Circuit have recently implemented programs using various alternative dispute resolution (ADR) techniques.

The Claims Court has notified counsel that it will utilize two ADR techniques: settlement judges and minitrials. Participation by litigants is voluntary. When counsel for both parties agree to employ either technique, they will notify the presiding judge, who will consider counsels' request. If ADR is considered appropriate, the clerk's office will assign the case to a Claims Court judge, who will preside over the procedure.

If the settlement judge method is used, the settlement judge will act as a neutral adviser, giving a judicial assessment of the parties' settlement positions, without jeopardizing their

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Inside . . .

Judicial Improvements Bill . . . . . p. 2

Paper on Sanctions Under Rule 11 Published . p. 5

Bail Reform Act Report . . p. 5

AO Releases Statistical Reports on Sentencing Variations, 1986 Judicial Workload

The AO's Statistical Analysis and Reports Division (SARD) has released two publications, *U.S. District Courts: Sentence Comparison Reports*, and *Federal Judicial Workload Statistics—December 1986*.

U.S. District Courts: Sentence Comparison Reports analyzes data for the two-year period ended June 30, 1986. The purpose of the report is to present data "to show variation in sentencing while attempting to explain some of the reasons for it."

The publication is a joint project of SARD, the Systems Services Division and the Probation Division of the AO, and the Research Division of the FJC. More than 2,000 federal probation officers and statistical clerks collected, coded, and transmitted the data to SARD.

Among the significant findings reported in *Federal Judicial Workload Statistics—December 1986* is that in 1986, the twelve regional courts of appeals reported a record 34,724 filings, up 3 percent from the previous year. The largest increases were in state prisoner petitions (up 19 percent) and federal prisoner petitions (up 9 percent).

Civil filings in the U.S. district courts declined 13 percent during 1986 compared to filings in 1985—from 278,778 cases filed in 1985 to 243,495. Much of the decline is a result of decreased filings for recovery of overpayments of veterans' benefits (VA) cases, recovery of defaulted student loans, and Social Security disability cases. The aggregate total of filings in these three categories was down 50 percent from 1985.

As in previous years, criminal cases filed, terminated, and pending in the district courts increased during the year. The number of persons under the supervision of the Federal Probation System climbed 7 percent from 67,844 to 72,416.

A total of 530,008 bankruptcy petitions were filed during 1986, up more than 28 percent over filings in 1985. Nonbusiness filings increased 32 percent while business filings rose 14 percent. ■

200 Years Ago...

June 1787: James Madison's Virginia Plan for a new Constitution, presented to the Convention in late May, would have combined the President and a few federal judges as a "council of revision" that could veto national or state legislation. "Annexing the wisdom and weight of the Judiciary to the Executive," he argued on June 6, would avoid "laws unwise in their principle, or incorrect in their form."

Rufus Gorham (Mass.) objected: Judges do not "possess any peculiar knowledge of the mere policy of public measures." At most, he would authorize the President "to call on Judges for their opinions." Co-delegate Elbridge Gerry opposed "making Statesmen of the Judges" and Luther Martin (Md.), noting that "the Constitutionality of laws . . . will come before the Judges in their proper official character," did not want to give them a "double negative."

"Laws," replied James Wilson (Pa.), "may be unjust, may be unwise, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." George Mason (Va.) also endorsed this "further use" of the judges, who "are in the habit and practice of considering laws in their true principles, and in all their consequences."

The proposal lost 8–3 on June 6 and 4–3 on July 21, with two states divided. Council opponent Charles Pinckney (S.C.) later proposed to authorize the President and Congress to seek advisory opinions from the judges, a provision the Committee of Detail did not include in its draft of the Constitution.

BICENTENNIAL OF THE U.S. CONSTITUTION

LEGISLATION

An omnibus bill proposing several improvements in the judicial branch has been transmitted to Congress by AO Director L. Ralph Mecham, and is expected to be introduced in the near future. Mr. Mecham has also submitted to Congress separate draft legislation to eliminate diversity of citizenship jurisdiction and to create additional district and appeals court judgeships.

The omnibus bill, entitled the Judicial Branch Improvements Act of 1987, embodies many recommendations made by the Judicial Conference of the United States over a period of several years. These include substantially eliminating the mandatory jurisdiction of the Supreme Court, permitting district courts with 8 or more permanent judges to appoint a district court executive, and authorizing experimental arbitration programs in the district courts.

Also included in the bill are provisions that would:

- Make adjustments in certain provisions governing jury selection and service.
- Repeal 28 U.S.C. § 1393, which presently provides for divisional venue in civil cases.

See LEGISLATION, page 5

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

NOTEWORTHY

Attorney's letter warranted disbarment. An attorney's letter accusing a magistrate of incompetence and/or religious bias warranted the attorney's disbarment from further practice in the district court, the Fourth Circuit has held. *In re Evans*, 801 F.2d 703 (4th Cir. 1986).

After a magistrate wrote a report recommending that a case be dismissed for lack of subject matter jurisdiction, the district judge conducted a de novo review and issued an opinion adopting the magistrate's report. The lawyer representing the party whose case was dismissed wrote a letter to the magistrate accusing him of incompetence or bias. He also filed a complaint against the magistrate with the Judicial Council for the Fourth Circuit, which was dismissed. A district judge wrote to the attorney on behalf of the district court's disciplinary committee, stating that the attorney's conduct was arguably in violation of three rules of professional responsibility: DR 1–102(A)(5), which forbids conduct prejudicial to the administration of justice; DR 7–106 (C)(6), which forbids conduct discourteous and degrading to a tribunal in which one appears in one's professional capacity; and DR 8–102(B), which forbids making accusations against a judge or other adjudicatory officer that one knew or should have known to be false. In two later letters to that district judge, the attorney repeated his charges that the magistrate was either incompetent or biased. A third judge of the district court entered an order requiring the attorney to show cause why he should not be disciplined for writing the letter to the magistrate. The court ultimately entered an order of disbarment signed by eight of the district judges. The district court held that the attorney's repeated assertions warranted disbarment. On appeal,

See **NOTEWORTHY, page 10**

PERSONNEL

Nominations

Paul V. Gadola, U.S. District Judge, E.D. Mich., Apr. 23

Robert F. Kelly, U.S. District Judge, E.D. Pa., May 1

David G. Larimer, U.S. District Judge, W.D.N.Y., May 5

Larry J. McKinney, U.S. District Judge, S.D. Ind., May 5

Philip M. Pro, U.S. District Judge, D. Nev., May 5

Rodney S. Webb, U.S. District Judge, D.N.D., May 5

Confirmations

James B. Zagel, U.S. District Judge, N.D. Ill., Apr. 21

Richard J. Daronco, U.S. District Judge, S.D.N.Y., May 7

David S. Doty, U.S. District Judge, D. Minn., May 7

Ronald S. W. Lew, U.S. District Judge, C.D. Cal., May 7

Reena Raggi, U.S. District Judge, E.D.N.Y., May 7

Senior Status

Spencer M. Williams, U.S. District Judge, N.D. Cal., Feb. 23

Deaths

Gus J. Solomon, U.S. District Judge, D. Or., Feb. 15

John K. Regan, U.S. District Judge, E.D. Mo., Mar. 9

James E. Doyle, U.S. District Judge, W.D. Wis., Apr. 1

Ross T. Roberts, U.S. District Judge, W.D. Mo., Apr. 24

Temporary Emergency Court of Appeals

Reynaldo G. Garza, Chief Judge, Apr. 30

GODBOLD, from page 1

Eleventh Circuit, serving in that position until September 1986.

Judge Godbold, speaking at a meeting of senior staff of the Federal Judicial Center shortly after his election by the Board, said: "As a circuit chief judge, I woke up every morning asking 'how can we do our jobs better?' I think a philosophy of constant reappraisal is compatible with the Center's philosophy of trying to see if there are better ways for the judiciary to meet its responsibilities."

Prior to his appointment to the bench, Judge Godbold was in private practice in Montgomery for 18 years. Two of his former law partners have also served as federal judges, Judge Richard T. Rives, who served as a judge of the Fifth Circuit Court of Appeals, and later of the Eleventh Circuit Court of Appeals, from 1951 until his death in 1982, and Judge Truman M. Hobbs, who was appointed to the bench in 1980 and currently is chief judge of the Middle District of Alabama.

Judge Godbold is a graduate of Auburn University and Harvard Law School. His law school career was interrupted by military service during World War II in the United States Army. In 1982, he received the Auburn University Alumni Award for Achievement in the Humanities.

Judge A. David Mazzone of the District of Massachusetts, chairman of the search committee, stated: "Judge Godbold is an outstanding and vigorous jurist. He has an established record of administrative ability and a commitment to judicial education and research. We are delighted that he has agreed to accept this important position."

Levin, who will return to the faculty of the University of Pennsylvania Law School as the first Leon Meltzer Professor of Law, praised the selection of Judge Godbold, noting the important contributions Judge Goldbold had made to the Center's work over the last decade. "He has been helpful, creative, and thoughtful, leaving a lasting imprint on the Center and its programs," Levin said. "This is truly a historic day for the Center."

The Center's first director was former Supreme Court Justice Tom C. Clark. Judges Alfred P. Murrah and Walter E. Hoffman also preceded Levin, who was appointed the Center's fourth director in 1977. ■

AO Recognizes Distinguished Service of 11th Cir. Employee in Bankruptcy Automation

AO Director L. Ralph Mecham has recognized the distinguished service of R. Ward Mundy of the Eleventh Circuit Court of Appeals for his exceptional accomplishment in the field of computerization in the bankruptcy courts. Mr. Mecham publicly recognized Mr. Mundy's contribution to the federal bankruptcy system during the Eleventh Circuit's Judicial Conference in May.

Mr. Mundy contributed to conceiving, accomplishing, installing, and maintaining a microcomputer system used in more than 60 federal bankruptcy courts. The system, the Bankruptcy Users Microcomputer System, provides automated support to small and medium-sized bankruptcy courts in advance of the BANCAP computer system designed by the FJC. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Baker, Thomas E., and Douglas D. McFarland. "The Need for a New National Court." 100 *Harvard L. Rev.* 1400 (1987).

Brennan, William J., Jr. "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 *New York University L. Rev.* 535 (1986).

Burger, Warren E. "Lawyers and the Constitutional Convention." 34 *Federal Bar News & J.* 106 (1987).

Cameron, James Duke, Isaiah M. Zimmerman, and Mary Susan Dowling. "The Chief Justice and the Court Administrator: The Evolving Relationship." 113 F.R.D. 442 (1987).

Federal Judicial Workload Statistics December 1986. Administrative Office of the U.S. Courts, Statistical Analysis and Reports Division, 1987.

Feinberg, Wilfred. "The Coming Deterioration of the Federal Judiciary." 42 *Record of the Association of the Bar of the City of New York* 179 (1987).

Fish, Peter Graham. *"Red Jacket* Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment." 5 *Law & History Rev.* 51 (1987).

Flanders, Steven. "Court Executives and Decentralization of the Federal Judiciary." 70 *Judicature* 273 (1987).

Ginsburg, Ruth Bader, and Peter W. Huber. "The Intercircuit Committee." 100 *Harvard L. Rev.* 1417 (1987).

Higginbotham, A. Leon, Jr. "The Life of the Law: Values, Commitment, and Craftsmanship." 100 *Harvard L. Rev.* 795 (1987).

Hudon, Edward G. "Growing Pains and Other Things: The Supreme Court of Canada and the Supreme Court of the United States." 17 *Revue Générale de Droit* 753 (1986).

Kaufman, Irving R. "The Creative Process and Libel." *New York Times Magazine*, Apr. 5, 1987, at 28.

✔ Levin, A. Leo, and Sylvan A. Sobel. "Achieving Balance in the Developing Law of Sanctions." 36 *Catholic University L. Rev.* 587 (1987).

Miner, Roger J. "Federal Courts, Federal Crimes, and Federalism." 10 *Harvard J. of Law & Public Policy* 117 (1987).

Nichols, Philip, Jr. "Selective Publication of Opinions: One Judge's View." 35 *American University L. Rev.* 909 (1986).

Posner, Richard A. "Law and Literature: A Relation Reargued." 72 *Virginia L. Rev.* 1351 (1986).

Shadur, Milton I. "Are Federal Courts Necessary?" 18 *Loyola University L.J.* 1 (1986).

Shapiro, David L. "In Defense of Judicial Candor." 100 *Harvard L. Rev.* 731 (1987).

Wald, Patricia M. "Administrative Law as Seen from the D.C. Circuit." (Interview conducted by Jeffrey Lubbers.) 34 *Federal Bar News & J.* 15 (1987).

Wald, Patricia M. "Some Thoughts on Judging as Gleaned from One Hundred Years of the *Harvard Law Review* and Other Great Books." 100 *Harvard L. Rev.* 887 (1987).

Positions Available

Director, Staff Attorneys Office, 5th Cir. Salary $53,830–69,976. Responsible for recruitment, personnel, and management decisions in 16-attorney office. Must be graduate of accredited law school (class standing upper third, or law review), with 5 years' legal experience, management experience, or demonstrated interpersonal skills. Apply immediately by sending resume and references to Steven A. Felsenthal, Director, Staff Attorneys Office, Rm. 116, 600 Camp St., New Orleans, LA 70130.

* * *

Chief Probation Officer, N.D. Ohio (Cleveland). Salary $45,763–72,500. Responsible for probation, parole, and pretrial services programs in the district (see 18 U.S.C. §§ 3654–3655). Requirements: college education (advanced degree preferred), 4 years' experience in personnel work in a helping profession in appropriate setting. Send letter of application and resume by June 4 to James S. Gallas, Clerk, U.S. District Court, 102 U.S. Courthouse, Cleveland, OH 44114.

* * *

Administrative Assistant for Space and Facilities to Circuit Executive, 5th Cir. Maximum grade: JSP–14. Position responsible for all facets of facilities planning, design, coordination, scheduling, and construction for circuit, district, and bankruptcy courts of the circuit, in conjunction with AO and GSA. Requires minimum 3 years' professional experience and undergraduate degree. Experience in developing floor plans and office layouts desirable. Extensive travel required. Send resume and salary history by June 30 to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130.

* * *

Circuit Librarian, 5th Cir. Maximum grade: JSP–14. Manages staff of 14; responsible for administration of law library in New Orleans and satellite locations. Requires 3 years' specialized experience in law library management, and M.L.S. or J.D. Send resume and salary history by July 15 to Lydia G. Comberrel at address in notice above.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 2

• Amend 28 U.S.C. § 1332(c), concerning removal and diversity jurisdiction in cases involving legal representatives of estates of decedents and legal representatives of infants or incompetents. The AO indicated in its submission to Congress that in proposing this revision of diversity jurisdiction, it did not intend to detract from the separate legislation proposing the abolition of diversity jurisdiction, as recommended by the Judicial Conference.

• Ratify the long-standing treatment of bankruptcy judges and U.S. magistrates as officers not subject to the provisions of the Federal Leave Act (5 U.S.C. §§ 6301–6323), and explicitly exempt from the act's provisions law clerks for judges on the circuit courts of appeals, district courts, and Claims Court and for bankruptcy judges and magistrates.

• Amend 28 U.S.C. § 371 to permit senior judges to receive military retired or retainer pay to which they would be entitled on the basis of regular or reserve military service.

• Amend 28 U.S.C. § 2254 to expressly provide that an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.

• Make certain amendments needed to mesh provisions of 28 U.S.C. with the newly enacted Federal Employees' Retirement System Act of 1986.

• Remedy a specific problem that has arisen as a consequence of existing disqualification requirements and their application in class action cases in which it is discovered that the judge's spouse, for example, owns a small amount of stock of one of the corporate parties to the litigation. Under the proposed revision, judges would be permitted to weigh the public interest in completing the litigation in determining whether to recuse themselves. A waiver of disqualification would also be permitted. Recusal would continue to be automatic and not waivable if the judge, judge's spouse, or a minor child residing in the judge's household had an interest in the controversy that could be substantially affected by the outcome.

• Charge the director of the AO with establishing a program of incentive awards for designated employees of the courts.

• Add to the U.S. Arbitration Act a provision clarifying the appeals doctrine in the area of appeals of orders relating to arbitration, generally denying immediate appeals from orders giving arbitration precedence over litigation, and permitting immediate appeals from orders giving litigation precedence over arbitration.

• Abolish the Temporary Emergency Court of Appeals.

• Repeal section 140 of Pub. L. 97–92, which has excluded judges from the Executive Salary Cost-of-Living Adjustment Act provisions applicable to other high-level federal officers (see *The Third Branch*, Oct. 1986, p. 1).

The omnibus bill also contains the following provisions relating to the FJC:

• Creates a Federal Judicial Center Foundation to accept gifts to be used by the FJC for the purpose of aiding its work. None of the members of the Foundation's board could be sitting judges, and no gift funds could be used to pay or supplement the salaries of FJC officers or employees.

• Directs the FJC Board to conduct, coordinate, and encourage programs to collect, preserve, and make available materials relating to the history of the federal judicial branch.

• Permits expenditure of FJC funds on training of nongovernment personnel who would improve the operation of the judicial branch. Such nongovernment personnel might include individuals training as mediators or arbitrators, or who agree to represent indigent defendants.

Judgeships and diversity elimination. Director Mecham submitted draft legislation to create 56 district court judgeships and 13 court of appeals judgeships. In submitting at the same time the draft bill to eliminate diversity of citizenship jurisdiction, Mr. Mecham estimated that if Congress eliminated diversity jurisdiction, the number of additional district

See LEGISLATION, page 10

FJC Publishes Report On 1984 Bail Reform Act

The Bail Reform Act of 1984, by Deirdre Golash, the most recent of the Center's publications designed to provide information on the Comprehensive Crime Control Act of 1984, is now available.

The work summarizes appellate court decisions interpreting provisions of the Bail Reform Act from Oct. 12, 1984, its effective date, to Jan. 13, 1987. An appendix reproduces the act, as amended by the Criminal Law and Procedure Technical Amendments Act of 1986.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (7 oz.), but do not send an envelope.

Paper on Rule 11 Sanctions Available

Achieving Balance in the Developing Law of Sanctions, a staff paper by A. Leo Levin and Sylvan A. Sobel, is now available from the FJC. The article, reprinted from the current issue of the *Catholic University Law Review*, examines recent appellate treatment of the sanctions provisions of rule 11 of the Federal Rules of Civil Procedure, describing patterns that are emerging as a result of the 1983 amendments.

Copies of the staff paper can be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (4 oz.), but do not send an envelope.

SESSIONS, from page 1

shals, dispute resolution, consolidation of Central Violations Bureau sites, and any other matter on which the Judicial Conference or the Committee seeks information or guidance.

The Five-Year Plan for Automation in the U.S. Courts has been an important part of the comprehensive effort to automate the federal courts. In the four years the plan has been in effect, has it functioned well?

Because the plan is a "living" plan and continues to evolve and change each year to meet the needs of the courts and benefit from new technologies and circumstances, I believe it has functioned well, notwithstanding the difficult budgetary restraints imposed by the Gramm–Rudman–Hollings legislation. The strength, flexibility and viability of the plan is demonstrated by two tremendous adjustments made within the last year: First, adding office and chambers automation and telecommunications to data processing and communications, and second, being able to react to the tremendous pressures brought on by the increase in bankruptcy filings throughout the United States necessitating the priority to complete the software for automation in the bankruptcy courts.

The role of the FJC in developing bankruptcy court applications from software systems for appellate and district courts has been a tremendous achievement, demonstrating the absolute necessity of careful research and development prior to implementation of projects.

In your opinion, what areas of federal court operations are likely to benefit most from use of automation?

It seems to me that any area of federal court operations that *can* be automated *will* benefit. The Central Violations Bureau concept has proven that with very few employees and good automated equipment it is possible to efficiently manage, from eight locations, the entire traffic violation and ticketing process, from ticket issuance to hearing before a magistrate, with great cost effectiveness and amazing results.

Giving the bankruptcy court the ability to have automated noticing, docketing, and full and complete case management reports will greatly enhance the bankruptcy court's ability to meet the mushrooming caseload.

In any court—appellate, district, magistrate, or bankruptcy—electronic docketing enhances the flow of information, enabling judges, courtroom deputies, clerks, and supervisors to efficiently manage case flow and reporting in a fashion not possible without automation.

William S. Sessions

Financial automation has revolutionized the courts' abilities to deal with jury vouchers, travel, and reporting.

Last summer, your subcommittee approved expansion of computer-assisted legal research (CALR) to courts with three judicial officers, and CALR is now available to courts with only two judicial officers. What benefits are likely to result from this expansion?

More and more judges recognize the great benefits to be derived from the most convenient access to CALR, in chambers if possible. This capability, I predict, will revolutionize the manner in which judges and law clerks research the law. The ability to "punch up" as opposed to "dig out" the law, and to Shepardize quickly and efficiently, and to have access in the workplace, is a capability which will generate phenomenal results and in a few years will be the norm.

How has expanded use of automation affected the Western District of Texas?

The Western District has seven, far-flung divisions, and comprises the largest geographic area of any district court in the continental United States. It includes San Antonio, the tenth largest city in the country, and four other smaller cities, Austin, El Paso, Waco, and Midland–Odessa. The district consistently maintains one of the largest criminal caseloads per judge in the United States. With limited judge power, the automation of the criminal system with terminals available in all divisions will allow constant and easy monitoring by the judges and court personnel.

Automated case management reports for both civil and criminal dockets are available monthly or upon request, as well as special reports from the civil calendars concerning every phase of case management.

Every deputy clerk has some type of experience with automated systems, and we are now installing the new civil docketing system, which will allow judges to have access to all information on civil cases in each division. Automation is now a way of life in the Western District of Texas.

Is there a CALR pilot program in your court and in Judge Bilby's court in Tucson?

That is correct. There are two pilot programs which are presently under way. Judge Bilby's will be the first to be installed. It has the same components that the Western of Texas will have, with one exception. It will have secretaries with personal computers for word processing purposes; the law clerks will have PCs for word processing purposes, and for CALR there will be an in-chambers PC to make it possible to have access to the data bases. In addition, in the Western of Texas I will have a courtroom PC which will

have access to the clerk's data base. This PC will not have word processing capability or CALR capability. All of these will be tied in so that information can be exchanged—records from the clerk's office to judges' chambers and to the courtrooms.

Why did they need the PCs right in the courtroom?

The judge's need for complete and current docket and motion information in the courtroom can be satisfied immediately if the PC is there. The judge's notes, taken during the course of motions hearings and trial, can be entered directly into the computer for recall at any time. The charge to the jury, if it is on the personal computer, can be changed and corrected at will. I am confident that judges will find many other uses for the personal computer in the courtroom.

Do you find your colleagues receptive to automation?

Generally speaking, yes. In January of 1983, when Judge Weis of the Third Circuit, Bankruptcy Judge McGuire of New York, and I were asked to serve a two-year term as an ad hoc Automation Committee attached to the Judicial Improvements Subcommittee, I was presented with my first opportunity to become aware of the nationwide reaction of judges to automation. I find all of them are curious, and most of them are receptive to being persuaded on the value of automation. My favorites are those who eagerly and impatiently await enhanced automation in their own courts, not only through CALR capability but courtside through case management reporting and access to the clerk's data bases.

What advances in automation and court procedures do you see in the federal courts five years from now, or ten to twenty years from now?

Our work towards providing automation capability for all judges tends to make me focus my attention principally on what is available now. The advance in technology in the past five years has been dramatic, and I predict that in the next 20 years it will be stunning. As Alvin Toffler suggests in *The Adaptive Corporation*, "Today's rapid and massive changes I see as a 'third wave' that is creating a wholly new civilization based on high technology, information, and new ways of organizing for economic purposes." The challenge to the judiciary is to be able to discern which technologies will be of the greatest benefit to the federal courts and then to find appropriate applications.

"The advance in technology in the past five years has been dramatic, and I predict that in the next 20 years it will be stunning."

As I mentioned, we are conducting pilot projects providing for chambers to have access to the clerk's data base for case management purposes on a day-to-day basis, together with CALR for judges and law clerks. These systems will have an intra-chambers network, providing capabilities never available before in judges' chambers. At the turn of the century, all judges' chambers will routinely have that capability.

Public access to court data bases for use by attorneys and the public will be routine. Eventually, attorneys, by use of personal computers or other devices in their offices, will have direct access to the clerk's data base and will be able to file documents directly from the attorney's offices into the clerk's data base. All this will make for a "paperless" exchange of information. High-speed readers and printers of all descriptions will facilitate a free flow of information between courts, attorneys, clerks, and the public, including the media.

Can the state and federal court systems learn from each other in coping with their caseloads, in development of automation or in other areas?

Beginning in the late 1960s, the Law Enforcement Assistance Administration provided substantial sums to the states and the communities for development of law enforcement related systems. In many parts of the country, computer systems were developed to enhance the capability of law enforcement as well as state courts at various levels. As a result, the states—and I emphasis the states—made great strides and can provide leadership to the federal courts. Many state courts presently make information available to attorneys and the public, providing for a freer flow of information. I believe great benefits will be derived in the future from broad cooperation between state and federal courts in the areas of automation. I certainly encourage the sharing of information about new technologies, processes, and procedures which can be mutually beneficial to the state and federal systems.

"The challenge to the judiciary is to be able to discern which technologies will be of the greatest benefit to the federal courts and then to find appropriate applications."

Did you find that your experience as a member of the FJC Board gave you a better insight into the entire federal court system?

My good fortune in being allowed to serve as a member of the Board from 1980 to 1984 provided me the opportunity to be associated with some of the most perceptive and knowledgeable judges in the federal

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SESSIONS, from page 7

courts. The Board was led by the most innovative and dynamic Chief Justice in the history of the United States, supported by the sterling leadership from Director A. Leo Levin and then-Director William Foley of the Administrative Office. This association over those years gave me an introduction to the scope and magnitude of problems confronting the judiciary across the country and emphasized the absolute necessity of designing and maintaining continuing education and training programs for the judiciary and court family. The leadership of the FJC in providing new and innovative approaches for education and training, involving new methods and concepts, continues to be essential in meeting the needs of the judges and the courts.

Based on your experience in the federal courts over a period of almost 13 years, what developments do you anticipate for the system?

The continuing eruption of litigation and increased responsibilities thrust upon the third branch by legislation has put the courts in jeopardy unless and until ways are found to support the judiciary in a fashion which will allow judges to dispense justice and decide cases and issues free of the unceasing press of administration and caseload. I am hopeful that continued, meaningful liaison with Congress and the Judicial Conference will eventually bring about procedures which will place some adjudicative responsibility, including appeal, on other administrative bodies and provide for selection and replacement of judges, including housing and support staffs, in a timely fashion. I am also hopeful that Congress will provide the mechanism to assure that judicial salaries achieve a reasonable parity with professional incomes to help assure that the judicial branch will not slowly slip from its position as an acknowledged first-rate judiciary. Should we fail, the constitutional imperative of government under law will be seriously, and possibly irrevocably, eroded.

How has your management style changed in the years you have served as chief judge?

I do not know that my management style has changed. Either a chief judge is willing to share and delegate responsibilities or is not. I believe that each head of a court family agency must have a strong, hands-on management style which will build and maintain a first-rate operation in that agency's area of responsibility. I believe in close, daily if possible, contact and discussion with those agency heads. With resident judges sitting in five of the seven divisions, it is difficult to delegate areas of responsibility; however, I believe it is important for all judges to recognize that they constitute a "court" and have the responsibility for overseeing various aspects of the court's operation for all of the judges.

"I don't believe that any one chief judge can decide that there is a 'proper managerial role' for every chief judge. The role . . . is, in great part, dictated by the configuration and size of the court."

What do you see as the proper managerial role of a chief judge? At what level of detail should a chief judge become involved in managing his or her court?

I don't believe that any one chief judge can decide that there is a "proper managerial role" for every chief judge. The role of the chief judge as a manager is, in great part, dictated by the configuration and size of the court. The geographical size of the district, the number of judges, as well as the number of magistrates, divisions, support offices, etc. tend to determine the appropriate management of the chief judge. If judges are stationed throughout a number of divisions, it will require a different style of management than in those districts where all judges are centrally located. A central location facilitates regular judges' meetings, which are not feasible if they are dispersed.

An effective manager must adapt his style to the circumstances of the court. The judges of the Western District of Texas are extremely patient with my never-ending flow of memos, on a daily basis, reflecting my action or requesting their input in connection with the myriad activities of the district. In the truest sense, they share the office of the chief judge. I simply happen to have the title.

Based upon the amount of time devoted to chief judge activities in a seven-judge court, I believe it would be extremely difficult for the chief judge of a major metropolitan court to be involved in the minutiae and detail of the everyday operation of that court. Great reliance must be placed on a competent and innovative clerk; an effective, efficient, first-class probation officer; and on wise, efficient, and energetic magistrates, with each of the activities monitored by a liaison judge representing and reporting to the court.

There is an unusual program in the San Antonio division of the Western District of Texas permitting court-appointed attorneys to satisfy their pro bono obligations to the court by appearing in civil rather than in criminal cases. How is this working out?

The current Plan for Appointment of Counsel in Criminal and Civil Cases in the San Antonio division was adopted in August of 1985. The plan provides an opportunity for attorneys less experienced in criminal defense to assist lead counsel as second-chair counsel under the direction of lead counsel. The plan further allows magistrates to assign law students to assist appointed counsel in criminal cases and to report to the appropriate law school authorities concerning the stu-

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SESSIONS, from page 8

dent's support activities. The plan also allows any attorney to satisfy the appointment obligation by accepting civil case appointments compatible with the attorney's expertise.

It works very well. Probably in the last year there have been a total of 15 appointments of lawyers in civil cases. One aspect of the rule is interesting. We have taken from our non-appropriated fund—which is the fund that is built from the fees paid by attorneys admitted to the court—and have provided for a payback of up to $300 in unreimbursed expenses incurred by counsel in representing clients in civil cases.

What are your views on proposals to have a specialized federal court to handle Social Security cases?

I think Justice Scalia is extremely perceptive. The idea that he proposes may be an idea whose time has come. I believe there is no compelling reason why many of those matters cannot be decided in the administrative law courts with a limited right of appeal. ■

CALENDAR

June 1–5 Orientation for New Probation and Pretrial Services Officers

June 3–5 Regional Seminar for Probation and Pretrial Services Officers

June 3–6 Sixth Circuit Judicial Conference

June 8–9 Judicial Conference Subcommittee on Judicial Statistics

June 11–12 Judicial Conference Subcommittee on Supporting Personnel

June 15–16 Judicial Conference Subcommittee on Federal Jurisdiction

June 15–16 Judicial Conference Subcommittee on Federal–State Relations

June 25–27 Fourth Circuit Judicial Conference

June 29–30 Judicial Conference Advisory Committee on Civil Rules

June 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

ADR, from page 1

ability to go to trial should settlement not be reached.

As summarized by the Claims Court in its notice to counsel, minitrials should be employed only in cases that involve factual disputes and are governed by well-established principles of law, and normally before significant discovery commences. If minitrial is used, each party will present an abbreviated version of its case to a neutral adviser—a judge other than the presiding judge—who will then assist the parties in negotiating a settlement.

The procedures governing minitrials provide that each party should be represented by an individual with settlement authority and that any discovery conducted should be expedited and limited in scope. According to the court, although minitrials will be tailored flexibly to the requirements of each case, in most circumstances the entire process should conclude within one to three months. The parties will meet with the minitrial judge for a prehearing conference, at which they will exchange brief written submissions summarizing their positions and narrowing the issues. Hearings will be informal—the rules of evidence and procedure will not apply—and should generally not exceed one day.

The court welcomes comments from the bar and public on its ADR plan, and will consider such comments and initial experience under the order in its continuing effort to further the effective administration of justice.

D.C. Circuit mediation program. Chief Judge Patricia M. Wald of the D.C. Circuit has announced that the court is implementing a civil mediation program on an experimental basis, utilizing distinguished senior members of the bar as mediators.

Pending civil cases, as well as cases filed in the future, were to be selected at random for assignment to mediation beginning May 8, pursuant to an en banc order. Under that order, pro se cases and cases involving multiple parties or intervenors will not be included. One of the key components of the court's program is its emphasis on maintaining confidentiality regarding the mediation process. Accordingly, program management has been placed in the Circuit Executive's Office, which will be responsible for case selection, program evaluation, development of procedures, and liaison between mediators and the court.

The impetus for the program arose in the context of the court's extensive revamping of procedures under its 1986 Case Management Plan. Judge Laurence H. Silberman was named chairman of the Subcommittee on Mediation, and was assisted by the court's Advisory Committee on Procedures, headed by attorney Daniel Gribbon.

The court's program will stress case settlement, although partial settlement of some issues or procedural streamlining of cases will also be considered successful outcomes. Throughout the settlement process, normal case processing will continue independently in the Clerk's Office, placing some pressure on counsel to arrive at a settlement decision before briefing begins, while simultaneously guaranteeing that a mediation case will not lose its oral argument slot if mediation fails. If necessary, arrangements can be made to extend briefing schedules or oral argument dates.

Under the terms of the court's en banc order, counsel will be required to provide some case documents to the mediator, to prepare a short "position paper" describing the case, and to attend the initial mediation session. Parties must be represented by someone with authority to enter into a settlement agreement during the session. Clients may attend, but are not required to do so.

A list of the mediators selected by the court and further information about the program can be obtained from Karen M. Knab, Circuit Executive, (202) 535-3340. ■

LEGISLATION, from page 5

court judgeships that would be needed could be reduced from 56 to 15.

The creation of the 13 permanent court of appeals positions and 40 permanent and 16 temporary district court positions was recommended by the Judicial Conference at its September 1986 meeting. The Conference's recommendations were the result of a nationwide survey of all federal courts of appeals and district courts conducted by the Conference's Court Administration Committee between September of 1985 and July of 1986.

In a letter to the chairman of the House Judiciary Committee, Director Mecham stated, "In formulating this set of recommendations in September of 1986, the Conference deliberately limited its request for additional judicial positions to that number believed to be absolutely essential; additional positions have been requested for individual courts only in those instances in which the Conference believes that those courts would be unable to serve the public adequately in the immediate future."

In other congressional action:

- Rep. Robert Kastenmeier (D-Wis.) has introduced H.R. 2127, to amend 28 U.S.C. to encourage prompt, informal, and inexpensive resolution of civil cases in U.S. district courts by the use of arbitration. He has also introduced H.R. 2128, to amend 9 U.S.C. to improve the appellate process in federal courts of appeals with respect to arbitration. (H.R. 2128 is identical to the arbitration provisions in the omnibus bill noted above.)
- The House Post Office Committee approved legislation designating Sept. 17, 1987, as a legal public holiday marking the bicentennial of the Constitution.
- Sen. Charles E. Grassley (R-Iowa) introduced S. 1134, identical to the "race to the courthouse bill" reported to the full House (H.R. 1162) last month by the House Judiciary Committee (see *The Third Branch*, April 1987, p. 2). Cosponsoring S. 1134 with Sen. Grassley are Sens. Strom Thurmond (R-S.C.) and Dennis DeConcini (D-Ariz.). ■

NOTEWORTHY, from page 3

the attorney argued that his conduct was protected by the First Amendment, that he was deprived of his right to a hearing, and that there were procedural irregularities in the conduct of the disbarment proceeding in the district court. The Fourth Circuit disagreed with all of these contentions and affirmed the disbarment order, stating that an appellate court owes substantial deference to a district court in matters of disbarment or suspension.

Bankruptcy trustee entitled to derived judicial immunity. A bankruptcy trustee was held to be entitled to derived judicial immunity absent evidence that he acted outside the limits of such immunity. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096 (9th Cir. 1986). ■

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THE THIRD BRANCH

VOLUME 19
NUMBER 7
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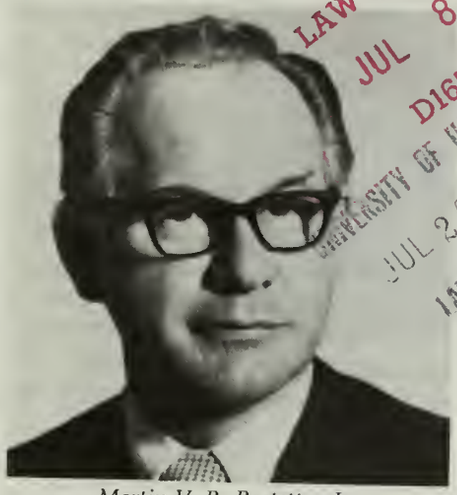
Judge Martin Bostetter Discusses Educational Needs, Recent Changes in Bankruptcy System

Judge Martin V. B. Bostetter, Jr., was orn in Baltimore, and received his A.B. nd LL.B. degrees from the University of irginia. He was appointed a U.S. bankuptcy judge for the Eastern District of irginia in 1959 and has been a member of e FJC Board since 1984.

In recent years there have been momentous changes in the bankruptcy ystem—the Supreme Court's 1982 pinion in *Northern Pipeline*, the ankruptcy amendments to the ederal judgeship act of 1984, and mar legislation in 1986. Have these vents, plus ever-increasing caseads, transformed the life of a bankptcy judge?

The original feeling was that the *orthern Pipeline* case would bring out substantial changes and reduce e caseload in the bankruptcy courts.



Martin V. B. Bostetter, Jr.

My experience has been that this is not true. The caseload here has continued to increase dramatically and this appears to be the situation nationally.

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Chief Justice Urges National Appeals Court, Repeal of Court's Mandatory Jurisdiction

In his recent speech to members of the American Law Institute, Chief Justice Rehnquist has urged that the remaining mandatory jurisdiction of the Supreme Court be abolished, thus giving the Court more latitude in choosing which cases to decide each year. He also reiterated his support for a national court of appeals, stating his preference for a new court whose judges would be nominated by the President and confirmed by the Senate.

The Chief Justice noted that the last major revision of the jurisdiction of the Supreme Court was in 1925. Since then, the number of decisions turned out by the federal courts of appeals and by the highest courts of the states has increased dramatically. The Court has been able to decide up to about 150 cases each term on the merits, the Chief Justice said, but this "really is the maximum."

"Today we decline to review cases involving important questions of federal law not previously decided by our Court, cases which the Court would have unquestionably heard

See REHNQUIST, page 5

ending Bill Would Expand FJC Role; Iagistrates' Retirement Bill Clears Congress

A bill that amends the governing atute of the FJC has been introduced the House by Rep. Robert W. astenmeier (D-Wis.). The bill, H.R. 67, would create a Federal Judicial enter Foundation with authority to cept and receive gifts for the Center, thorize the Center to implement a story program for the judicial anch, provide limited authority for ining for persons outside the judil branch, and provide for the apintment and compensation of the puty director of the Center. These endments were unanimously recmended by the Center's Board.

The proposal to establish a foundan with authority to receive gifts for Center was developed by a comttee chaired by former judge Philip Tone. The foundation would be ected by a board, none of whose mbers would be sitting judges. e provision was fashioned in this way so that the Center and its governing body would be sufficiently insulated from any procedure for accepting gifts from private sources to safeguard both the independence and the appearance of independence of the judiciary.

FJC Director A. Leo Levin testified in support of the proposed amendments to the Center's statute at an oversight hearing of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The subcommittee also welcomed Judge John C. Godbold, who has been elected to succeed Professor Levin as FJC director, and who will take office on Aug. 1. Deputy Director Charles Nihan also participated in the hearing.

Other developments on Capitol

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1987 Audiovisual Media Catalog Published by FJC ..... p. 4

NEWS FROM THE SENTENCING COMMISSION

The Sentencing Commission in June distributed draft worksheets for sentencing guidelines application to Article III judges, U.S. attorneys, public defenders, U.S. magistrates, chief U.S. probation officers, and U.S. probation offices. The worksheets are part of a packet that includes several examples applying the guidelines to actual cases.

Feedback on these draft worksheets, designed to enhance understanding the guidelines' operation, will be helpful to the commission in developing final worksheets for use when the guidelines are implemented. The draft worksheets and illustrative cases are the first steps in developing a comprehensive workbook for probation officers, judges, attorneys, and others to use in applying the guidelines.

The commission is also disseminating a supplementary report that further explains its guidelines and policy statements; details the effects on federal prison population of the guidelines, the 1986 Anti-Drug Abuse Act, and the career offender provisions of the Sentencing Reform Act; analyzes disparity in sentencing; and addresses a variety of other topics. ■

LEGISLATION, from page 1

Hill of interest to the judiciary include these:

- H.R. 1947, to provide enhanced retirement credit for U.S. magistrates, to be equal to the benefits provided bankruptcy judges, was passed in both the House and Senate and was signed by the President on June 18 as Pub. L. No. 100-53.
- Rep. Robert Kastenmeier introduced H.R. 2586, which would provide a new retirement system for magistrates and bankruptcy judges, similar to that of the territorial judges.
- Rep. James A. Traficant, Jr. (D-Ohio) introduced H.R. 2227, to make the salaries of bankruptcy judges equal to those of Article III federal district judges; the bill is before the House Judiciary Committee.
- AO Director L. Ralph Mecham has transmitted to Congress a draft of proposed legislation to make improvements in the federal court interpreter program.
- The House passed H.R. 1162, providing for random selection of a court of appeals to hear appeals in the so-called "race to the courthouse" situation (appeals to multiple circuits, filed with respect to the same agency order). The bill is awaiting Senate action.
- The Civil Rights Restoration Act of 1987, S. 557, was ordered reported favorably (with amendments) to the full Senate by the Senate Labor and Human Resources Committee. The bill is in response to the Supreme Court's 1984 *Grove City College* decision, and would broaden the coverage of certain civil rights statutes beyond the scope accorded them by *Grove City*.
- Rep. John Conyers, Jr. (D-Mich.) has introduced H.R. 2515, to amend 18 U.S.C. ch. 215 to allow counsel to accompany a witness into a grand jury room, and the House Judiciary Committee's Subcommittee on Criminal Justice has held a hearing on the measure.
- Sen. Howell Heflin (D-Ala.) has introduced S. 1248, a bill to make technical amendments to the State Justice Institute Act of 1984. One provision of S. 1248 would create a new section in the act to protect the confidentiality of information made available to persons conducting research under a grant from the Institute. ■

THE THIRD BRANCH

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200 Years Ago...

July 1787: What became Article III of the Constitution took substantial shape from July 18 to 21, as the Convention voted to create a "supreme tribunal" and authorize the legislature to create "inferior tribunals." It agreed on presidential nomination and senatorial confirmation of the judges, despite George Mason's fear that "appointment by the Executive . . . might even give him an influence over the Judiciary department itself."

The convention unanimously endorsed tenure during good behavior but struggled over a prohibition against lowering *or* increasing judges' salaries. Benjamin Franklin would have allowed increases because "Money may not only become plentier, but the business of the department may increase as the Country becomes more populous." Madison, though, worried that allowing Congress to raise salaries could create a judicial dependence on the legislature. If members of Congress were parties to federal litigation, "the Judges will be in a situation which ought not to [be] suffered." The problem of an inflated currency could be avoided "by taking for a standard wheat or some other thing of permanent value." But the convention, six votes to two, sided with Gouverneur Morris: "The value of money may not only alter but the State of Society may alter. . . . The Amount of salaries must always be regulated by the manners & the style of living in a Country. . . . Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited."

BICENTENNIAL OF THE U.S. CONSTITUTION

Ninth and Tenth Circuit Courts of Appeals Appoint Bremson, Murret as Circuit Executives

Eugene J. Murret has been elected circuit executive for the Tenth Circuit Court of Appeals by the Judicial Council of the circuit and will enter on duty Aug. 1, 1987. Mr. Murret succeeds Emory G. Hatcher, who retired last December.

Eugene J. Murret

For the past sixteen years Mr. Murret served as the judicial administrator for the Supreme Court of Louisiana. He holds a B.A. from Loyola University of New Orleans, a J.D. from Loyola Law School, and an LL.M. from New York University School of Law. Mr. Murret has been active in the ABA, has taught law at Loyola University School of Law, and has served as an instructor in judicial administration at Tulane University.

Francis L. Bremson

Francis L. Bremson entered on duty as circuit executive for the Ninth Circuit on March 27. Previously Mr. Bremson served as executive director of the Alaska Judicial Council;

See BREMSON, page 8

Administrative Orientation Programs Initiated for Chief Bankruptcy Judges

The AO and the FJC have initiated a program of orientation sessions for chief bankruptcy judges. Three chief bankruptcy judges attended the first-ever such session in April, and a second orientation session was held in June for another group of judges.

The sessions, which are similar to those for newly appointed chief judges of circuit and district courts, are designed to provide the judges with background information to assist them in discharging their administrative responsibilities as chief judges. Meetings were held with the director and deputy director of the AO, with each assistant director, and with various division and branch chiefs who manage the individual programs that provide support to the bankruptcy courts. Briefings on programs and services of the FJC were provided by key FJC officials.

The FJC is presently preparing a *Desk Book for Chief Judges of the United States Bankruptcy Courts*.

NOTEWORTHY

Local rule on judicial approval of prosecutors' subpoenas of lawyers upheld. The First Circuit Court of Appeals has upheld a local rule adopted by the U.S. District Court for Massachusetts that requires a prosecutor to obtain prior judicial approval to subpoena an attorney to a grand jury for evidence about a client of the attorney. *United States v. Klubock*, No. 86-1413 (1st Cir. Mar. 25, 1987). The district court in 1986 amended its local rules to include such a requirement, which had already been adopted by Massachusetts's Supreme Judicial Court. The district court's local rule was challenged by the United States and various federal prosecutors. They claimed that the local rule violated the supremacy clause of the Constitution because it allegedly conflicted with the Federal Rules of Criminal Procedure, and was therefore invalid as both a state court rule and as a local federal court rule.

The First Circuit found the supremacy clause argument moot. The prosecutors had claimed that as members of the state bar, they might be vulnerable to state disciplinary charges for actions taken outside Massachusetts. The court took note of the state bar counsel's announced policy that the rule would not be applied against any federal prosecutor for any action taken extraterritorially, and held that while such a policy is in effect, there is no supremacy clause case or controversy. As to the federal district court's rulemaking power, the appeals court held that the rule "is a reasonable regulation of the dynamics that underlie the adversarial process," and a "limited, reasonable response to what appears to be a mounting professional problem."

Local rule concerning discovery in prisoners' pro se petitions held invalid. A local rule of the U.S. District Court for the Eastern District of Arkansas, requiring leave of court before allowing invocation of discovery processes in cases of pro se prisoners' petitions brought under section 1983, has been held invalid. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987). The rule was held to be in conflict with the Federal Rules of Civil Procedure.

Plaintiff may not withdraw consent to trial before magistrate. There is no absolute right to withdraw validly given consent to a trial before a magistrate, the Fifth Circuit held in an appeal of an employment discrimination lawsuit. The plaintiff had sued her employer under title VII, and the parties opted for trial before a magistrate under 28 U.S.C. § 636(c). Shortly before trial, the plaintiff attempted to withdraw her consent to trial before a magistrate. The magistrate denied the motion and at trial found against the plaintiff on the merits. The plaintiff appealed both the decision on the merits and the refusal to permit her to withdraw her consent to trial before a magistrate. She did not deny that her consent was valid when made, but alleged that she had a "right" to withdraw her consent. "We find nothing in the statute . . . that would allow a party to express conditional consent to a reference [of a case to a magistrate], thereby obtaining what amounts to a free shot at a favorable outcome or a veto of an unfavorable outcome," the Fifth Circuit held. *Carter v. Sea Land Services*, 816 F.2d 1018 (5th Cir. 1987).

S.D.N.Y. report. Chief Judge Charles L. Brieant (S.D.N.Y.) has released the *1986 Court Report* detailing various aspects of the court's business during 1986. During the statistical year July 1, 1985, to June 30, 1986, there was a 5.5 percent increase in the number of civil and criminal filings, to a total of 11,828. The combined number of terminations rose 13 percent to 11,531.

See NOTEWORTHY, page 5

AO Director Mecham Recognizes Group's Efforts Resulting in Cost Savings on Computer Purchase

AO Director L. Ralph Mecham has presented the Director's Special Award to a group of employees whose efforts resulted in substantial savings in a computer purchase contract. Receiving the award were Ellen Bartelt, Cristin Birch, and Judy Steele of the AO and John Brinkema of the FJC for their work on the procurement of computer systems for the Federal Court Automation Project (FEDCAP) from December 1984 through April 1986.

Ms. Bartelt, Mr. Birch, and Mr. Brinkema defined, developed, and refined the specifications for computer equipment and systems software. They then served as the technical evaluation committee that ultimately selected and awarded the FEDCAP contract. Ms. Steele served as the contract specialist and the contact point for all vendor inquiries, participated in nationwide equipment performance evaluation tests, and completed the cost evaluation portion of the selection process. Their combined efforts resulted in a contract enabling the courts to buy up to 120 computers at a price 40 percent lower than had originally been anticipated. ■

Judge Holds Attorney in Contempt for Refusal to Proceed with Summary Jury Trial

The U.S. District Court for the Southern District of Illinois has held an attorney in criminal contempt for failure to comply with the court's order that he participate in the selection of a jury for a summary jury trial. *Strandell v. Jackson County,* Civ. No. 85-4159 (S.D. Ill. Apr. 17, 1987). According to a final pretrial order in the case, a trial of the matter would have taken 20 to 25 days. The court, citing its heavy caseload, including a number of criminal cases subject to the Speedy Trial Act, ordered the parties to proceed with a nonbinding summary jury trial. Plaintiff's counsel objected to the procedure and filed a motion claiming that the court was powerless to compel the parties to engage in it. The court concluded that its authority to require participation in the procedure derived from Fed. R. Civ. P. 1, 16(a)(1), 16(a)(5), and 16(c)(11), the court's inherent power to manage and control its docket, and a 1984 resolution of the Judicial Conference, and fined plaintiff's counsel $500 for his contempt. ■

1987 Audiovisual Media Catalog Available from FJC

The Center recently published the *1987 Catalog of Audiovisual Media Programs*, a revision of the 1985 catalog. This new edition has been updated with new audiocassettes, videocassettes, instructional software, and films available for loan to federal judicial personnel only from the media library of the Center's Information Services.

Catalog items are grouped by subject matter and include recordings of Center seminars and workshops, specially produced Center media programs, and programs from commercial sources and other government agencies. The catalog does not list all, or even most, presentations at Center seminars; programs have been selected on the basis of their topicality and level of past use.

The catalog's introduction describes the organization of the materials listed and includes directions for requesting items, a reproducible request form, and a checklist for use in setting up a VCR.

Copies of the catalog have been distributed to a large segment of the federal judiciary, including judges, magistrates, clerks, circuit and district executives, chief probation and pretrial services officers, offices of senior staff attorneys and federal public and community defenders, and court training coordinators. Other federal judicial personnel may obtain copies by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (5 oz.), but do not send an envelope.

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Committee on Federal Courts. "Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes." 42 *Record of the Association of the Bar of the City of New York* 374 (1987).

✓ Marshall, Thurgood. "Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, May 6, 1987."

✓ Pieras, Jaime, Jr. "Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method." 35 *Catholic University L. Rev.* 943 (1986).

✓ Rehnquist, William H. "Boston University Commencement Address, May 17, 1987."

✓ Rehnquist, William H. "Remarks at the Sixty-Fourth Annual American Law Institute Meeting, May 19, 1987."

Rosenberg, Maurice. "Chief Judge Wilfred Feinberg: A Twenty-Fifth Year Tribute." 86 *Columbia L. Rev.* 1505 (1986).

von Hirsch, Andrew, Kay A. Knapp, and Michael Tonry. *The Sentencing Commission and Its Guidelines.* Northeastern University Press, 1987 [analysis and suggestions for state sentencing guidelines efforts, based on the experiences of Washington, Pennsylvania, and Minnesota].

Wilkinson, J. Harvie, III. "Address at the FBA Fourth Circuit Court of Appeals Conference Banquet." 34 *Federal Bar News & J.* 109 (1987).

CALENDAR

une 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

uly 6–9 Video Orientation Seminar for Newly Appointed District Judges

uly 8–10 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

uly 8–10 Judicial Conference Committee on the Administration of the Probation System

uly 9 Judicial Conference Committee on Rules of Practice and Procedure

uly 12–25 Summer Trial Practice Institute (Session 2) (for new assistant defenders)

uly 13–14 Judicial Conference Committee on the Administration of the Criminal Law

uly 13–15 Workshop for Personnel Officers

uly 14–15 Staff Safety Program (W.D. Mo.)

ly 14–17 Workshop for New Training Coordinators

ly 16–18 Eighth Circuit Judicial Conference

ly 20–21 Judicial Conference Committee on Court Administration

ly 20–24 Orientation for New Probation and Pretrial Services Officers

ly 21–22 Staff Safety Program (N.D. Tex.)

ly 23–24 Judicial Conference Committee on Judicial Ethics

ly 29–31 Tenth Circuit Judicial Conference

ug. 3–4 Judicial Conference Committee on the Operation of the Jury System

ug. 3–5 Circuit Case Initiation and Processing

Position Available

Staff Director, U.S. Sentencing Commission. Salary to GS-18. Substantial experience in criminal law or criminal justice required. Principal responsibilities include staff supervision and coordination of all commission activities, including guideline promulgation and research. Apply to William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, Suite 1400, 1331 Pennsylvania Ave., N.W., Washington, DC 20004.

EQUAL OPPORTUNITY EMPLOYER

REHNQUIST, from page 1

and decided as little as thirty years ago," the Chief Justice said. "[W]e are simply unable to take and decide many cases which raise important and undecided issues under the Constitution and the statutes of the United States."

Noting the "debate and . . . considerable opposition" that have surrounded previous proposals for a national court of appeals, the Chief Justice said that he nonetheless remains "confident that in due course we will have" such a court.

When Chief Justice Burger first proposed a plan for a national court of appeals, he suggested that the body be created on a temporary basis and constituted with presently sitting judges of the various courts of appeals around the country. Chief Justice Rehnquist noted that that proposal "poses knotty problems of how these judges are to be chosen." Thus, while he could accept "any sensible proposal" for choosing the judges, he believes that "eventually we must recognize that the need is for a new court whose judges should be nominated by the President and confirmed by the Senate."

The proposal to repeal the Court's mandatory jurisdiction, the Chief Justice said, has "all nine members of our Court . . . solidly behind it, and so far as I know there is little or no opposition to it in any segment of the legal community." The Chief Justice estimated the benefit to the Court that abolition of mandatory jurisdiction would have, using as an example the last five terms of court. During those terms, the cases decided on the merits that came by way of appeal, rather than by way of certiorari, averaged about 35 per term. Were mandatory jurisdiction to be abolished, even assuming that the Court would have granted certiorari in half of those 35 cases, the abolition of mandatory jurisdiction could still be expected to give the Court 15 or 20 new "slots" for other important cases to be reviewed, the Chief Justice observed. ■

PERSONNEL

Nominations

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., June 2

John D. Tinder, U.S. District Judge, S.D. Ind., June 2

Confirmations

Richard J. Daronco, U.S. District Judge, S.D.N.Y., May 7

David S. Doty, U.S. District Judge, D. Minn., May 7

Ronald S.W. Lew, U.S. District Judge, C.D. Cal., May 7

Reena Raggi, U.S. District Judge, E.D.N.Y., May 7

Haldane R. Mayer, U.S. Circuit Judge, Fed. Cir., June 11

Layn R. Phillips, U.S. District Judge, W.D. Okla., June 11

Appointments

Edward Leavy, U.S. Circuit Judge, 4th Cir., Apr. 8

Malcolm F. Marsh, U.S. District Judge, D. Or., Apr. 16

David S. Doty, U.S. District Judge, D. Minn., May 8

Senior Status

William C. Conner, U.S. District Judge, S.D.N.Y., Mar. 31

James E. Barrett, U.S. Circuit Judge, 10th Cir., Apr. 8

Death

Noel P. Fox, U.S. District Judge, W.D. Mich., June 3

NOTEWORTHY, from page 3

The number of filings per authorized judgeship increased from 415 to 438. In 1986 there were two vacancies in the court's complement of judgeships, and there were four additional positions authorized by Congress that had not been filled at the time of the report's release. "Filling these vacancies is critical if this overworked court is to discharge its responsibilities," Judge Brieant wrote in the *Report*'s introduction. The *Report* also summarizes the work of the court's various committees, and of the District Court Executive's Office, Clerk's Office, Probation Department, Pretrial Services Agency, and Bankruptcy Clerk's Office. ■

BOSTETTER, from page 1

One of the factors is the ever-increasing use of the bankruptcy code as a major implementation in reorganization cases. For instance, since the *Bildisco* case, labor contracts have been involved in the bankruptcy courts' jurisdiction, and more creative use of the bankruptcy laws by the bar—in particular by knowledgeable, sophisticated attorneys in the larger areas—has brought about a very, very great increase. We have seen a more and more liberal interpretation of what a core proceeding is. If the matter is a core proceeding, there is no question that a bankruptcy court has jurisdiction to hear it. The related matters can also be heard by the bankruptcy court. What is a related matter also has been interpreted broadly. Taken together with holdings that objections to jurisdiction must be raised early in the proceeding, there is no question but that this tends to give more work to the bankruptcy courts.

I think the general conclusion would be that there has been an ever-increasing workload, caused not just from the standpoint of numbers of cases filed but also by the breadth of jurisdiction. I find that I am essentially handling the same types of cases that I handled prior to the *Northern Pipeline* decision but that the caseload is much heavier.

The Administrative Office reports that during 1986 bankruptcy petition filings were up 28 percent above 1985. How does this increase in filings make itself felt on a day-to-day basis?

There are several aspects here that we have to consider. Number one, when you get additional heavy filings, that causes a backlog, and until you get the people authorized, hired, and trained, you really aren't starting to cut into the backlog. The AO is now reviewing the situation quarterly, which is very helpful, so that if we get heavy increases in filings in a given quarter it alerts them to the situation and they are able to grant authorization more quickly. The hiring and training process, however, takes about six months. During this time it is necessary to divert other personnel from their duties to help train, and that can create an even greater backlog, so it is a very difficult problem. During the training period you can choose to reduce certain services to the public—for example, some courts only answer the telephone during certain periods of time. Another possibility is to eliminate certain functions that are accomplished in the clerk's office. This usually results in case closings being neglected, but that many times is the only alternative. So the overall effect is a reduction in services to the public as well as a reduction in the functions of the clerk's office itself.

"One of the things we are trying to do at the Center with bankruptcy education is weave in more case management and control of calendar techniques."

Some of the courts have begun maintaining a hiring register on which they keep the names of eligible persons. They maintain these names so that they can hire a new person as soon as possible.

In this regard, under the direction of Mr. Mecham, the AO has become more and more helpful and cooperative, not only in personnel matters but in matters generally. The attitude is very, very good. I think the relationship between the bankruptcy courts and the Administrative Office is the best that I have ever seen in my 28 years in the bankruptcy court.

Congress authorized the creation of 52 new bankruptcy judgeships in 1986; funding has passed both houses of Congress and the supplemental appropriation measure is now before a conference committee. Will this help significantly?

Ultimately it will certainly help. However, it will take some time before we will feel the impact. The period of selection is only the first step and that can take anywhere from three to six months. After the selection, there must be an FBI clearance, and the IRS is required to check the nominee as to any tax problems. Then the period from the time he is sworn in until there is really some benefit to the public depends on the experience of the person that has been appointed. I would say that the minimum period before the judge is comfortable in the position is about six months. One of the things we are trying to do at the Center with bankruptcy education is weave in more case management and control of calendar techniques, because this seems to be the area where we can make our judges, especially new judges, most proficient more quickly. If they attain proficiency in this area it will really help them attain maximum efficiency.

Will salary increases for the bankruptcy judges help stabilize the bankruptcy court system?

Yes. In order to attract well-qualified individuals, you have to offer proper compensation, and if you consider that a majority of the judges still have children who are either going into college before long or are presently in college, and if there are two or even three in college at the same time with the present salary, it virtually becomes impossible to live within the standard to which you should be entitled. In recent years, bankruptcy judges have been paid from 86 percent to almost 92 percent of the district judges' salaries. Under the recent recommendation, however, bankruptcy judges' salaries were increased by only 2.8 percent this year, and this fell disproportionately to only 81 percent of a district judge's salary. With the cost of living, it is just impossible to attract well-qualified people who could be out making $250,000 or more in private practice.

Another factor to be considered is that a proper salary not only attracts well-qualified applicants but helps keep them in the system. This, in addition to a good retirement system, is absolutely essential to a stable system. There is presently a retirement

ill pending which would be non-ontributory and, I think, vest at 14 ears. This is the type of retirement ill that should be enacted and is qually as important as salary for ob-ious reasons.

What has been the experience of he bankruptcy courts since the new Chapter 12 dealing with the family armer?

My court is not in a rural area, so I ave had very few Chapter 12s. I un-erstand, however, that in at least one ther court they have had approxi-nately 150 filings, and have con-rmed about 80 percent of them; that here is very good cooperation from he Farmers Home Administration nd it appears to be working very ell.

An interesting sidelight to that is at in some of the other courts the ebtor's indication that he might file a hapter 12 case has increased the pos-bility of working out the situation utside of the court. In other words, it as encouraged the creditors to go ong with the debtor's plan that he roposed without going through a rmal court proceeding, so even the reat of a Chapter 12 has had some fects also.

From what I understand, the sys-m seems to be working. One of the sues that has arisen is eligibility—nat are agricultural products. There also the issue whether or not you n convert from a Chapter 11 to a apter 12. The courts seem to be just out evenly divided on whether or t there can be a conversion.

As a member of the Court Admin-ration Committee of the Judicial nference, would you propose that e Conference suggest the legisla-n be amended to clarify Congress's ent on conversion?

There is a Bankruptcy Committee bcommittee that I would think uld want to propose that. If I were a mber of that committee I would tainly suggest it.

The U.S. trustee system is now in e Department of Justice. Do you nk this is a good change?

Well, if we remember the initial premise, which was that the trustees should have independence from the bankruptcy courts, then it seems to me that the legislation is proper from that standpoint. The independence of the U.S. trustee removes the trustee panel from control of the court. The court having control is in direct opposition to the concept of having such an independent trustee system, and it is impossible to give the appearance of total independence when the court is appointing and supervising the trustees.

On the whole, I think the change is a good one. I know that there is a wide variety of opinions as to whether or not it is a good system. However, I speak from the pilot system that we had here, which combines the Eastern District of Virginia with the District of Columbia. I felt and still feel that our pilot trustee program here has worked very well. One of the problems has been underfunding. Congress took away, or the U.S. trustee system lost, a lot of their funding, and they had to reduce many of the services. It is hard to judge whether or not a machine is running well if you don't spend sufficient monies to maintain it properly. This makes it very difficult to judge its overall quality. But I would say that the trustee system is definitely one that can be utilized as an important part of the bankruptcy court system, which includes, among other things, examination of requested fees. The U.S. trustee in this district examines applications by attorneys and other professional persons for compensation as counsel for the debtor and the like. In addition, they have been very helpful in monitoring Chapter 11 cases to see that they move along on a proper basis, to assure that, among other things, debtors file their monthly reports on time. Thus, given the proposition that the trustees should be independent, the system, if properly utilized and properly funded, I think can be a very good one.

> **"[T]here is very good cooperation from the Farmers Home Administration [on family farmer cases] and it appears to be working very well."**

You recently assisted the Center by chairing the seminar held at Hershey and attended by 50 new bankruptcy judges. What were some of the concerns of the judges?

The principal reason for my attending these seminars and sharing my ideas with other judges is that I want to get feedback from the judges as to what subjects and presentations are most helpful to them. I want to be sure that we are really helping them; to find out how we can improve; and in what areas they need help that they are not getting. There are two things to learning: One is the teaching and the other is the learning. The presentation by the lecturer can be a very crucial part. The lecturer should give a live presentation in an understandable way, so that the recipient can assimilate what is being presented. When people write down their evaluations about the presentations, they have trouble being critical and putting it in writing.

They are anonymous, aren't they?

Well, you are supposed to put down what court you are from. But there is still some psychological impact there, and I find that eyeball to eyeball, so to speak, you really learn how people feel; how was the topic presented; was it helpful. At this last seminar we received a lot of good comments on case management and calendaring. We want to give more emphasis to this area.

In connection with new judges, we now try to have a video seminar as soon as possible after appointment. This is usually in groups of five or six new bankruptcy judges. We gather them together in one place for a video presentation. There is a discussion leader who leads the discussion and answers questions after each video.

See BOSTETTER, page 8

BOSTETTER, from page 7

Then, as soon as we have a sufficient number of new judges, usually 50, we bring them together and present a live seminar.

How long is it before you try to reach a new bankruptcy judge with an educational experience?

Ideally, for a video seminar, which includes case management and calendaring as well as some basic substantive matters, within two or three months, but certainly within six months. The sooner the better. Then the live seminar, ideally within twelve months, which covers a very wide variety of topics. Unfortunately, because of the requirement of presenting the live seminar to a minimum of 50 new judges, they have been held every other year. The FJC Board has just authorized an additional live seminar for bankruptcy judges, however, because of the large number of judges authorized by the new legislation but, as I indicated, we usually hold them every two years. In addition, I am trying to encourage the judges to assist each other in the area of exchange of new ideas and procedures, which also can be beneficial.

Is automation in the bankruptcy courts helping?

Yes. When computerization first came along there was a misconception spawned that within a short period of time it would cut down on the number of personnel. That is not true. In some instances additional personnel are required initially until the system is in place and operational. However, the ultimate advantage is that a better product plus more workload can eventually be handled by the same number of people. Its efficiency is proven.

We are presently using the BANS system, which is the bankruptcy noticing system. Some courts have a bankruptcy users' microprocessors system, referred to as BUMS, which is simply an IBM-compatible computer with which they can not only notice but can maintain a docket and utilize other programs for which software is available. Also presently under development is the BANCAP system, which has created a kind of internal struggle. The AO has turned its resources, and I think quite rightly so, to this third system called the BANCAP system, which is a complete system: It will notice, it will take care of docketing, and will really give us an overall product. The problem is, though, as to how much money should be spent to keep in place the things that you already have—the BANS system and the BUMS system—or should you use all of your money to establish the BANCAP system. Recently, BANCAP has been given the go-ahead. It is presently in force in three courts. My understanding is that they are New York Western, Washington Western, and Texas Western as a pilot project. Of course, ultimately it will be expanded. We expect to have it in place next year in the Eastern District of Virginia. This, I think, will be an excellent solution to the many problems of noticing and docketing.

Now, I might interject one other thing here. I understand the Justice Department has been authorized for a relatively short period of time to develop a system, which presumably the bankruptcy clerks could use. The success of this remains to be seen. ■

BREMSON, from page 3

as a regional director for the National Center for State Courts; and as project director for a comprehensive court management project for the courts of Cuyahoga County, Ohio. He has published and lectured extensively on a variety of topics on judicial administration. He is a graduate of Hobart College and Georgetown University Law Center, and in 1980 graduated from the Institute for Court Management. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

VOLUME 19
NUMBER 8
AUGUST 1987

AO Director Mecham Announces New Court Administration Division

AO Director L. Ralph Mecham has nnounced that he is establishing the Court Administration Division in the dministrative Office of the U.S. ourts effective Oct. 1, 1987. The new ivision will provide basic program ssistance, support, and coordination district court executives, clerks of ourt (appellate, district, and bankuptcy), court reporters, court interreters and librarians. It will take over e functions currently performed by e Clerks Division, the Office of ourt Reporting and Interpreting ervices, the Office of Library and egal Research Services, and the Ofce of the Special Assistant for Jury d Speedy Trial Matters. The staff of ese organizations will be transrred to the new division.

Mr. Mecham stated he expected that consolidating existing functions d resources in one division, he will able to provide a greater range of rvices and assistance to clerks of urt and other supporting personl. Recruitment of a chief for the new vision began immediately on a naonwide basis. In addition, action s being taken to fill several other ofessional positions in the new divion. Mr. Mecham also said that he is

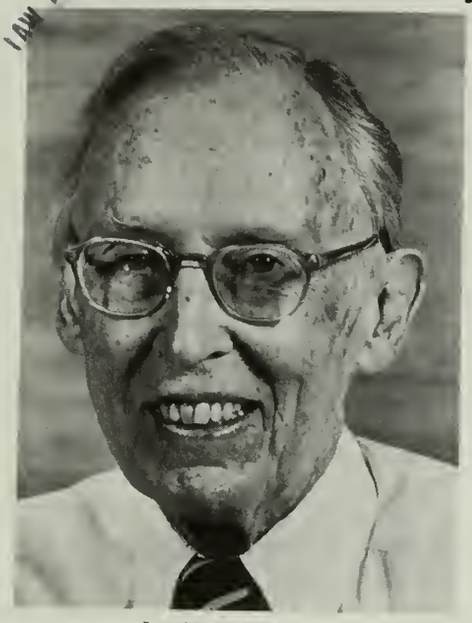
See AO, page 5

Seminar Scheduled for New District Judges

Judge John C. Godbold, FJC Director, has announced that the next seminar for newly appointed district judges will be held Nov. 16–21. All sessions will be held at Dolley Madison House in Washington, D.C., including a reception for the udges and their families on Nov. 15 at six o'clock.

The program includes a dinner at he Supreme Court on Nov. 17.

Justice Lewis F. Powell, Jr., Retires; Members of Judiciary Join in Tribute



Lewis F. Powell, Jr.

On June 26, Justice Lewis F. Powell, Jr., announced his retirement from the U.S. Supreme Court after more than 15 years of service. Tributes to Justice Powell from within the judiciary as we went to press include the following:

Chief Justice William H. Rehnquist

Justice Powell came to the Court after an illustrious career of private practice and public service bespeaking the best traditions of the legal profession. He has now capped that career with 15 years of able and devoted service as a justice of this court. We shall miss his wise counsel in our deliberations, but we look forward to being the continuing beneficiaries of his friendship.

Retired Chief Justice Warren E. Burger

Having served for 14 years as a colleague of Justice Powell, and having worked with him for many years before in programs for the improvement of justice, I have high appreciation of his service to the country. Throughout his entire private career he was making significant contributions to the public at the local and state, as well as national, level, both in education for better citizenship and in the law. I salute him.

Judge John C. Godbold, FJC Director

Justice Lewis Powell has exemplified intellectual integrity, a deep sense of fairness, and a full measure of common sense. He has served well

See POWELL, page 4

Chief Judge Winter Shares Views on Caseload, Settlement Roles, Opinion-Writing Practices

Chief Judge Harrison L. Winter was appointed to the Fourth Circuit in 1966 and became chief judge in 1981. He had previously served over four years as U.S. district judge for the District of Maryland, and had also served as assistant attorney general and deputy attorney general for Maryland, and as city solicitor for Baltimore. He has served as a member of the Judicial Conference Committee on the Operation of the Jury System.

What are your main concerns today as to processing cases in the Fourth Circuit?

My principal concern at the appellate level is in having the requisite number of judges to hear and decide the cases promptly. Presently the court of appeals is terribly understaffed. For many months in the court year I need five panels of judges, and in the other months four panels. When you consider that we have only eleven active judges and two seniors (who, fortunately, work a very large percentage of the time) you can see what my concern is. I am constantly in the process of borrowing and recruiting help. For the last year the situation has been made more acute because Judge Wilkins, the chairman of the

See WINTER, page 7

New York State Bar Survey of Lawyers, Judges Finds Strong Support for Rule 11 Sanctions

A study released by a committee of the New York State Bar Association shows that lawyers and judges in the federal courts in New York strongly support sanctions under Fed. R. Civ. P. 11.

More than 1,400 lawyers and 43 judicial officers responded to the survey conducted by the state bar's Committee on Federal Courts. The survey was sent to 8,000 attorneys throughout New York State specializing in a wide range of areas, with equal attention to counsel for plaintiffs and defendants; 20 percent of the attorneys responded. All federal judicial officers in New York were invited to participate, and more than 40 percent did so.

Seventy-five percent of the lawyers and 93 percent of the federal judicial officers responding feel that sanctions are necessary. Eighty-seven percent of the judicial officers think that rule 11 serves a useful purpose and should be retained in its present form.

The current practice of permitting a court to compel the loser to pay the winning attorney's fees in a variety of circumstances is accepted by 90 percent of the bench and bar, according to the survey. Half of the lawyers and one-third of the judges surveyed suggested requiring the loser to pay the winner's attorney's fees even more frequently than at present. However, 90 percent of the bar and two-thirds of the bench oppose adoption of the English system, which requires the loser to pay all costs and attorneys' fees.

The report provides data on the amount of time spent on sanctions (less than 5 percent in 80 percent of

See STUDY, page 10

200 Years ago...

August 1787: With the Constitution's structural outlines in place, the Convention turned to such issues as congressional control over the slave trade.

Gouverneur Morris (Pa.) "never would concur in upholding domestic slavery. It was . . . the curse of heaven on the States where it prevailed." To Mason (Va.), the slave trade concerned "not the importing States alone but the whole Union." Slavery "discourages art and manufactures. The poor despise labor when performed by slaves." Slaves "bring the judgment of heaven on a Country. As nations cannot be rewarded or punished in the next world they must in this."

To Rutledge (S.C.), "religion and humanity had nothing to do with this question. Interest alone is the governing principle. . . . The true question is whether the Southern States shall be parties to the Union." Georgia, said Baldwin, would resist "an attempt to abridge one of her favorite prerogatives."

In the end, the Convention retained the slave trade for 20 years (as part of a late August compromise involving commercial regulation), along with the three-fifth's clause for representation and protection for fugitive slave laws.

Some slavery opponents thought, as did Gerry (Mass.), that the problem would go away. "As population increases, poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country."

Others, perhaps with Gerry's erroneous prediction in mind, saw the concessions as necessary for union. They accepted the view that the slave trade could not "be excluded without encountering" what Madison thought were "greater evils."

BICENTENNIAL OF THE U.S. CONSTITUTION

NEWS FROM THE SENTENCING COMMISSION

Guideline education. The Sentencing Commission and the FJC's Committee on Guideline Sentencing Education, chaired by Judge A. David Mazzone (D. Mass.), have established a working relationship to implement the committee's plan on guideline education announced in Judge Mazzone's May 12 memorandum to chief judges, chief probation officers, and federal defenders. Commission Chairman William W. Wilkins, Jr., said that "we look forward to working closely with Judge Mazzone and his colleagues, and the Center staff, to ensure that the training plan meets its goals."

Testing the sentencing guidelines. The commission is currently field testing its guidelines in four sessions around the country, with the help of small groups of U.S. probation officers from 10 districts. These sessions, as well as in-house clinical testing programs with commission staff, will help the commission correct deficiencies and ambiguities in the guidelines, commentary, and draft worksheets.

Supplementary report. The commission's *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* has been widely distributed within the judiciary and elsewhere. It includes a detailed study of the projected impact on federal prison population of the guidelines, the Anti-Drug Abuse Act of 1986, the Career-Offender Provisions of the Sentencing Reform Act and the baseline growth in federal convictions.

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

LEGISLATION

The House of Representatives recently passed legislation that, if enacted into law, would revise the procedure by which amendments to federal rules are drafted and take effect, and is intended to increase participation in the rulemaking process by all segments of the bench and bar. The legislation, title II of H.R. 2182, is virtually identical to a bill passed by the House in the 99th Congress (H.R. 3550, the Rules Enabling Act), except that the bill has been amended to permit the rules process to supersede amendments to the rules made by act of Congress, thereby satisfying the only remaining objection to the bill by the Judicial Conference.

H.R. 2182 is entitled the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987. The act's title II is identical to H.R. 1507, introduced in this Congress by Rep. Robert W. Kastenmeier (D-Wis.) to provide a vehicle to reconsider the 99th Congress's H.R. 3550, which the House passed unanimously in 1985 after a review of the Rules Enabling Act process by the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice (see *The Third Branch*, Feb. 1986, at 3).

H.R. 2182 requires, in part, that the membership of the Judicial Conference committees that work on federal rules of practice, procedure, and evidence be fully representative of the bench and bar; that reasonable notice be given so that interested persons will have adequate opportunity to comment upon proposed rules and amendments; and that meetings of the Judicial Conference committees that work on rules be open unless a committee votes to close a meeting. It sets forth procedures for ensuring the consistency of local rules with the national rules.

Title II would, in part, repeal the supersession provisions in existing law, which provide that all laws in conflict with the federal rules shall be of no further force or effect after such rules take effect. Those supersession provisions, which originated with the enactment of the original Rules Enabling Act of 1934, are regarded by the bill's sponsors as no longer necessary as a practical matter with respect to statutory enactments outside the rules.

The bill provides that local rules established by federal district courts would be reviewed for consistency with the national rules by the judicial council of the appropriate circuit, and that local rules established by the courts of appeals would be reviewed for consistency with the national rules by the Judicial Conference. The language of H.R. 2182 broadens the language that was contained in the bill in the 99th Congress (H.R. 3550), to provide for Judicial Conference review of local rules of the U.S. Claims Court and the U.S. Court of International Trade.

Title I of H.R. 2182 amends 18 U.S.C. § 4247(b), which deals with a psychiatric or psychological examination ordered under 18 U.S.C. ch. 313, *Offenders with Mental Disease or Defect.* Section 142 of the bill passed by the House would authorize a licensed or certified psychologist to conduct such an examination, enlarging the number of qualified persons from whom a court may draw when ordering such a mental examination. Section 142 is consistent with the ruling in *Massey v. Manitowoc Co.*, 101 F.R.D. 304 (E.D. Pa 1983), that a mental examination under Fed. R. Civ. P. 35(a) could be conducted by a licensed psychologist who is not a physician. Rep.

See LEGISLATION, page 5

1988 Seminar for Appellate Judges Announced

A national seminar for all judges of the U.S. courts of appeals will be held in Washington, D.C., Oct. 24–26, 1988.

The seminar was proposed by the FJC's Committee on Appellate Judicial Education, chaired by Judge Richard S. Arnold of the Eighth Circuit, and was approved by the Center's Board earlier this year.

1988 marks the 200th year of the Judiciary Act of 1789, the pivotal legislative decision that the national government would establish its own court system. The seminar will provide an opportunity to take stock of federal appellate judging on the eve of the federal judiciary's third century, and to treat standard topics of law and procedure and special developments.

PERSONNEL

Nominations

Ernest C. Torres, U.S. District Judge, D.R.I., June 23

William D. Hutchinson, U.S. Circuit Judge, 3d Cir., June 26

Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., June 26

Clarence A. Beam, U.S. Circuit Judge, 8th Cir., July 1

T.S. Ellis III, U.S. District Judge, E.D. Va., July 1

George C. Smith, U.S. District Judge, S.D. Ohio, July 1

William L. Standish, U.S. District Judge, W.D. Pa., July 1

Jerome Turner, U.S. District Judge, W.D. Tenn., July 1

Charles R. Wolle, U.S. District Judge, S.D. Iowa, July 1

R. Kenton Musgrave, Judge, U.S. Court of International Trade, July 1

Robert H. Bork, Associate Justice, U.S. Supreme Court, July 7

James A. Parker, U.S. District Judge, D.N.M., July 10

Confirmations

Robert F. Kelly, U.S. District Judge, E.D. Pa., June 25

Robert H. Bell, U.S. District Judge, W.D. Mich., July 1

Appointment

Haldane Robert Mayer, U.S. Circuit Judge, Fed. Cir., July 9

Retirement

Lewis F. Powell, Jr., Associate Justice, U.S. Supreme Court, June 26

POWELL, from page 1
the law, the Supreme Court, and our country. Moreover, his courtesy to and concern for his fellow members of the federal judiciary have been models for all judges.

A. Leo Levin, FJC Director Emeritus

Justice Lewis Powell has been widely and justly acclaimed for his exemplary service as an associate justice of the U.S. Supreme Court. The Nation owes him much. In addition, Justice Powell and his wife, Jo—wonderful human beings, considerate and thoughtful—have enriched any number of Center functions, adding significantly to our already immense debt to them.

L. Ralph Mecham, Director, Administrative Office, and FJC Board Member

A measure of the man is the high regard of his friends who know him best. I have been greatly impressed with the genuine affection which Justice Powell enjoys among the judges and staff of his home circuit, the Fourth, and in the Eleventh Circuit, in which he has served as circuit justice. He has represented his Nation admirably.

Tributes from Chief Judges of the Circuits

Chief Judge Levin Campbell (1st Cir.)

Justice Powell was a paradigmatic judge who endeavored to determine and apply the law wherever it led. Few will dispute that he exemplified, both in character and ability, many of the finest judicial qualities.

Chief Judge Wilfred Feinberg (2d Cir.)

He was a judge without preconceived notions. His opinions made clear in each case that he wrestled with his conscience, disciplined by the forces of reason and precedent. The phrase "a scholar and a gentleman" was obviously meant for him.

Chief Judge Harrison L. Winter (4th Cir.)

The Fourth Circuit views Justice Powell's resignation with great regret but accepts it as a decision that he alone should make. We have always affectionately viewed him as our "second" circuit justice. We thank him for his superb and devoted service to the Court and hope that he will sit with the Fourth for many years.

Chief Judge Charles Clark (5th Cir.)

Nature has combined in Lewis Powell its highest qualities of scholar and gentleman. No matter who his successor may be, the Court will miss him, justice will miss him, America will miss him.

Chief Judge Pierce Lively (6th Cir.)

Justice Powell had a distinguished career as a practicing attorney. This experience appeared to enable him to resolve each case solely on the procedural and substantive issues presented. This quality engendered confidence in the work of the Court.

Chief Judge William J. Bauer (7th Cir.)

Justice Powell was a quiet, studious man who made a great impact on the law. He made a tremendous contribution to the law and his profession. He will be sorely missed.

Chief Judge Donald P. Lay (8th Cir.)

American law has been greatly enhanced because of Justice Lewis Powell, and all of us who have been privileged to know him have been greatly rewarded through his friendship.

Chief Judge William J. Holloway, Jr. (10th Cir.)

Justice Powell's impact will be a lasting one. His contributions are memorable due to his keen sense of justice, his strength of intellect, and his dedication to vigorous protection of individual rights.

Chief Judge Paul H. Roney (11th Cir.)

Justice Lewis F. Powell has been the circuit justice for the Eleventh Circuit since its inception in 1981. He has been a constant inspiration to the judges of our circuit, both professionally and personally. Justice Powell exemplifies all the finest qualities of a great judge. He has been a warm, concerned, and wise friend, and we cherish the relationship he has had with our circuit.

Chief Judge Patricia Wald (D.C. Cir.)

Justice Powell was the kind of judge before whom any advocate could argue with absolute trust that her case would be fairly heard—a fine jurist and a lovely man.

Tributes from FJC Board Members

Judge Alvin B. Rubin (5th Cir.)

Justice Powell has served this Nation nobly. Having been an able lawyer as well as a leader in the organized bar, he was a splendid member of the Supreme Court. His wisdom, integrity, and dignity as a justice made him a model for the district and circuit judges of the United States. He has helped to educate all of us.

Judge A. David Mazzone (D. Mass.)

Justice Powell will be missed. His opinions were helpful because they were context-specific. They were thoughtful, careful and disciplined, supported by analogy.

Judge William C. O'Kelley (N.D. Ga.)

Justice Powell's retirement is received with great remorse. We of the trial bench viewed him as a great jurist, lawyer, and above all, a wonderful man. He was the circuit justice for our circuit and he will be missed there. We wish him much happiness in retirement.

Judge Anthony M. Kennedy (9th Cir.)

Justice Powell has made a vast and scholarly gift to our jurisprudence, but even more important is the example he has set for every judge. His belief that the law becomes rich from the case system of adjudication, his warmth and compassion, and his absolute probity all consist with the great traditions of the judiciary of the United States.

Bankruptcy Judge Martin V. B. Bostetter, Jr. (E.D. Va.)

Justice Powell's dedication as a scholar and servant of the law leaves a heritage of which we can all be proud.

LEGISLATION, from page 3

Dan Glickman (D-Kan.) noted in an analysis of H.R. 2182 that in deference to the Rules Enabling Acts, no change is being made by the bill in rule 35(a), but urged the Judicial Conference's Advisory Committee on Civil Rules to address whether rule 35(a) should be amended to include licensed or certified psychologists.

Title I of H.R. 2182 also makes a minor change concerning the temporary release of a person who is hospitalized following an acquittal by reason of insanity for a serious offense. Another amendment permits the transmittal of wagering information from a state where gambling is legal to a foreign country in which gambling is legal.

In other legislative developments

- Senator Howell Heflin (D-Ala.) introduced S. 1482, the Judicial Branch Improvements Act of 1987 (see *The Third Branch*, June 1987, at 2).

- Senator Heflin also introduced S. 951, entitled the Federal Courts Study Act. The bill, like its companion measure in the House, H.R. 1929, would establish a Federal Courts Study Commission, which would, in part, study the jurisdiction of the federal courts, evaluate their "procedures, personnel, business and administration," and "develop a long-range plan for the future of the Federal Judiciary." The commission would have fourteen members, four to be appointed by the President, two to be Senate members, two to be House members, four to be appointed by the Chief Justice, and two to be appointed by the Conference of Chief Justices. The Senate Committee on the Judiciary's Subcommittee on Courts and Administrative Practice held a recent hearing on the measure, at which Judge J. Clifford Wallace (9th Cir.) testified for the bill. Then-director of the FJC A. Leo Levin also testified in an individual capacity before that subcommittee.

- The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice approved H.R. 2553 for full committee action; it authorizes $325 million for the Legal Services Corp. in fiscal year 1988, an increase of about $19.5 million over the current authorization.

- S. 1250, legislation to reauthorize the State Justice Institute for an additional four years, through FY 1992, has been introduced by Sen. Joseph D. Biden and seven members of the Senate Judiciary Committee, Sens. Howell Heflin (D-Ala.), Edward Kennedy (D-Mass.), Howard Metzenbaum (D-Ohio), Dennis DeConcini (D-Ariz.), Patrick Leahy (D-Vt.), Paul Simon (D-Ill.), and Arlen Specter (R-Pa.). The SJI is requesting an appropriation of $12,892,000 for FY 1988.

- A bill that restricts the use of lie detector tests in employment by most private employers cleared the House Education and Labor Committee by a vote of 25 to 9. The bill, H.R. 1212, was introduced by Rep. Pat Williams (D-Mont.), and has 179 cosponsors. The bill would prohibit the use of the tests as a condition for getting or keeping a job, but would not apply to federal, state, or local government employees, nor to persons doing counterintelligence work. H.R. 1212 sets civil penalties for employers who violate the act. Several amendments were offered while the bill was before the committee. Various amendments proposed would have permitted the use of polygraph testing by "security services" businesses, such as the armored-car industry, and by the pharmaceutical industry, day-care centers, and other businesses. The amendments were rejected by the committee, but the full House is expected to consider adding exemptions to the bill's coverage. ■

AO, from page 1

interested in attracting persons to these positions who have had first-hand experience in court operations.

Robert J. Pellicoro, present chief of the Clerks Division, will remain in his present position until Oct. 1, when he will be reassigned. Thereafter he will assist in establishing the division on a sound basis and will also advise senior management in the AO on planning and policy matters.

Director Mecham also announced the appointment of David A. Sellers as public information officer for the AO. Mr. Sellers will be a part of the Legislative and Public Affairs Office, which is headed by Robert E. Feidler. He will handle all media inquiries regarding administration of the federal court system and the activities of the Judicial Conference of the United States.

"Dave brings to the office a solid background in legal journalism as well as a knowledge of the federal court system, which should combine to make him a valuable addition to our office," Mr. Mecham said.

Mr. Sellers spent the past five years with *The Washington Times*. Previously he served as editor of *Bar Report*, the official newspaper of the District of Columbia Bar, and as a public information specialist for the Pennsylvania Department of Justice. ■

CALENDAR

Aug. 3–4 Judicial Conference Committee on the Operation of the Jury System

Aug. 3–5 Circuit Case Initiation and Processing

Aug. 9–11 Judicial Conference Committee on the Budget

Aug. 17–21 Ninth Circuit Judicial Conference

Aug. 19–21 Seminar for Magistrates of the Fifth and Eleventh Circuits

Aug. 24–25 Staff Safety Program

Aug. 24–26 Workshop for Personnel Officers

Aug. 24–28 Orientation for New Probation and Pretrial Services Officers

Aug. 27–28 Staff Safety Program

Aug. 31–Sept. 4 Orientation of New Magistrates

Sept. 8–11 Seminar for Newly Appointed Appellate Judges

NOTEWORTHY

Scope of judicial immunity doctrine. The proper scope of the doctrine of judicial immunity continues to figure in recent court decisions involving personnel decisions of both federal and state judicial officers, and the Supreme Court has granted certiorari in one such case, *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987). That case poses the issue whether the doctrine of judicial immunity bars a civil action against a judge for demoting and discharging an employee, allegedly because of her sex. The Seventh Circuit in *Forrester* held that the official duties of an Illinois probation officer are inextricably tied to discretionary decisions considered to be judicial acts, and therefore the state judge's decision to discharge the probation officer was entitled to absolute judicial immunity from a sex discrimination claim.

In *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), the former personal secretary of a bankruptcy judge brought an action for wrongful termination, alleging that she had been discharged in violation of her First Amendment free speech rights. The district court dismissed the case on the basis of absolute judicial immunity. The appeals court, stating that "[t]his case requires us to draw a line between the administrative and the judicial acts of federal judges," held that the actions of the bankruptcy and district court judges in firing the secretary "clearly fall outside a protected judicial act."

In *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), Illinois state judges who investigated a chief probation officer's request to discharge a probation officer were held to be involved in a "judicial act" and entitled to judicial immunity. The judges conducted a hearing for the employing court, as required by Illinois statute in cases involving the suspension of probation officers. The hearing "had all the elements of a judicial proceeding," the appeals court noted. The judges conducting it for the court had no interaction with the plaintiff other than that initiated by the plaintiff. Moreover, an Illinois statute expressly provided that probation officers shall be removable in the discretion of the courts appointing them. The opinion, by Senior Judge William J. Campbell, relied on the Seventh Circuit's earlier holding construing the scope of judicial immunity in *Forrester*.

Presentence investigation reports subject to disclosure under FOIA. Two prisoners requested copies of their presentence investigation reports under the Freedom of Information Act. In separate summary judgment motions, the Districts of Arizona and Northern California ordered release of the reports. On appeal of the consolidated cases, the Ninth Circuit affirmed, holding that the reports were "agency records" when they were in the

See NOTEWORTHY, page 11

Workload Statistics Released by AO

The Administrative Office has released the *Federal Judicial Workload Statistics* report on the business of the federal courts for the 12-month period that ended March 1987.

The report shows that both filings and terminations increased in the 12 regional courts of appeals, with filings nationwide rising by 2 percent to a record high of 34,761 appeals.

The number of civil cases filed in U.S. district courts fell nearly 9 percent compared to the previous 12 months. The reduction in filings has resulted primarily from decreases in two types of actions—suits filed by the U.S. government to recover on defaulted student loans and overpayments of veterans' benefits, which fell by almost 46 percent during the year, and Social Security disability filings, which decreased by 26 percent. Data from recent months, however, have shown that Social Security disability case filings are again on the rise. Asbestos product liability filings rose by nearly 50 percent to 7,786 cases. Petitions filed by state and federal prisoners rose by nearly 11 percent.

The number of criminal cases filed rose by nearly 5 percent to 42,949.

Requests for the report should be directed to the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, Washington, DC 20544.

Positions Available

District Executive, S.D. Fla. Salary to $72,500, depending on experience. Provides top-level direction and supervision over personnel and staff coordination, space and facilities, budgeting and accounting, statistics, court security, and office automation. Degree in business, public administration, or law desirable. Submit resume and cover letter by Sept. 14 to Chief Judge James Lawrence King, U.S. District Court, 301 N. Miami Ave., Federal Courthouse Square, Miami, FL 33128.

* * *

Clerk, W.D. Ark. Salary to $53,830. Requires 10 years' administrative experience in public service or business, at least 3 in substantial management position; college or law degree may be substituted for experience. To apply, send 2 copies of resume by Aug. 15 to Clerk of Court, P.O. Box 1523, Ft. Smith, AK 72902.

* * *

Administrative Office of the U.S. Courts.

Chief, Court Administration Div., GS-301-15. Salary from $53,830 to high 60s, depending on experience and prior federal service, if any. Promotion potential to GS-16. Serves as member of the AO's senior staff. Must have experience organizing and directing an organization consisting of multiple functions. *Selective factor:* Knowledge of theories, principles, and functions of court management.

Chief, Clerks Operations Branch, Court Administration Div., GS-301-15. Salary from $53,830 to high 60s depending on experience and prior federal service, if any. Serves as a first line supervisor for a small staff of professionals involved in providing support to clerks' offices. *Selective factor:* knowledge of theories, principles, and functions of court management.

Senior Clerks Administrator (BK), GS-301-12/13/14.

Senior Clerks Program Specialist, GS-301-12/13/14.

Clerks Administrator (General), GS-301-11/12/13.

Please contact Joyce Stanley, (202) 633-6116, for copies of vacancy announcements and application procedures. All applications must be received by Personnel, Administrative Office of the U.S. Courts, by close of business Aug. 21, 1987.

EQUAL OPPORTUNITY EMPLOYERS

WINTER, from page 1

Sentencing Commission, has to devote at least half of his time to the work of the commission, and one other active judge on the court has had a protracted illness and has been able to participate very little.

In what category are most of your criminal cases?

Most are drug cases. We have a *large* number of these. I suppose any circuit in states that have a coastline has some of these massive drug operations. We certainly get a lot in South Carolina; we get them from Maryland, North Carolina, and Virginia also. These are places for importation. I am not prepared to say that there are more than in the Eleventh, or even in the Fifth, but we certainly have enough.

When you have a heavy drug case docket, do you get extra judicial help, as they did in Florida?

No, not from outside the circuit. Our help has always been intracircuit, where we get judges to come from another district. When you couple cases of this type with the Speedy Trial Act, the fact is that the civil docket suffers from inattention, and inescapably so in a lot of cases. It is unfortunate, but I do not know what the answer is except to have more judges.

In general I approve the concept of the Speedy Trial Act. The difficulty is that it has given priority to a given group of cases, and if you get many of these cases in an area where you do not have too much judge power, then the other parts of the docket suffer.

Statistics from the AO show that though the number of appeals filed in the Fourth Circuit increased by more than 4 percent in 1986 over 1985, the number of appeals pending declined by 4.8 percent. To what do you attribute this?

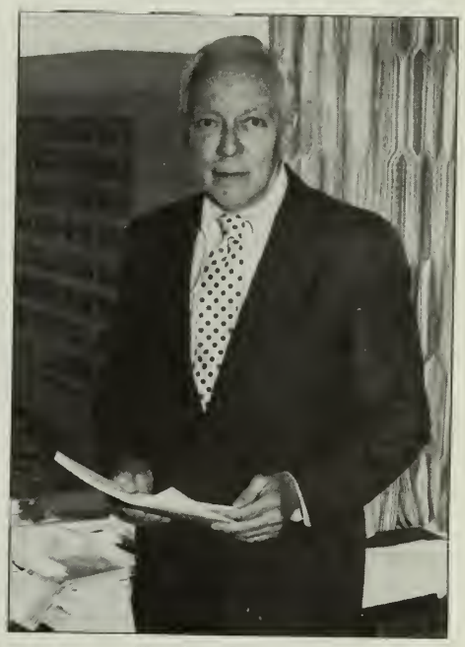
We have a remarkable record, but I am afraid it is not one that we are going to be able to perpetuate. Within this period we had a planned resignation. Judge Sneeden, who had been a member of the court for only a brief period of time, announced some months in advance that he would resign for personal reasons. By that time he had participated in a number of appeals, and he had a number of opinions in various cases assigned to him. We made an extraordinary effort to get him to complete the opinions in cases which were assigned to him and to have the other judges submit opinions to him in the cases in which he was a co-panelist, to avoid the necessity of having to rehear the cases in the event of disagreement between the other two judges. But this was an extraordinary effort, and it is not something which judges can sustain over a long period of time. We had been making an extraordinary effort before, for several years, to keep abreast of a mounting caseload with an inadequate number of active circuit judges to hear the cases. But, here again, I worry that this effort cannot be sustained for too long a period.

"I think that a judge should confine himself to a very limited role in seeking settlements."

Do you and the other judges in your circuit press for settlement and alternative dispute resolution?

Only to a limited extent, and I would like to amplify the reasons for this. I have not pressed vigorously for this, because I think that a judge should confine himself to a very limited role in seeking settlements. Perhaps I am a bit gun-shy from my experience over the years. As a practicing lawyer I had some bad experiences, and resented greatly what I considered to be improper pressure from a judge to settle a case. So when I first came on the court as a district judge, I felt very strongly that while a judge should ask counsel if they had discussed settlement, and require that they at least explore the possibility, he ought not to implicate himself or involve himself into the basis on which a case should be settled or the price to be put on a case and the like. So while I encourage settlements in the abstract, I did not encourage settlements in the concrete.

How much should the judge be involved in settlements?



Harrison L. Winter

I know that some judges have a reputation among the bar as improperly pressing for settlements and in some instances, I regret to say, I think that the reputation is well deserved. The judge should do no more than making sure that counsel have made a genuine effort to reach agreement. He should not set forth the basis on which a case should be settled.

You have been talking about settlements on the trial level. How about the circuit level?

Turning to the appellate level, we have not in the Fourth Circuit done anything or adopted any procedures which are directed to settlement and alternative dispute resolution. I think one of our problems is that, as a circuit where the lawyers are widely dispersed and where transportation is not the easiest in the world, we have considered it impractical or op-

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pressive to bring counsel in a large number of cases before a judge to explore the possibility of settlement. I understand that some courts are doing this by conference call, and I admit that this is a possibility which we have not really considered. I am aware that some courts claim an impressive record on settlement of cases even at the appellate level. Interestingly enough, we have a lot of cases which settle at the appellate level, and I think it is a result of the fact that we monitor filings and pay close attention to scheduling. It is a matter of judgment, of course, not something that one can prove, but I am inclined to think that the marked success with settlement in some of the other circuits results in large part from the fact that there is demonstrated the interest of the judicial officer in what's going on in the case. We do about the same thing, but we do it through the clerk's office by fixing a tight briefing schedule and requiring that parties adhere to the schedule. We supervise very closely the court reporters, so that our transcripts are filed when they are due. In other words, we try to adhere strictly to the time schedule set forth in the appellate rules, and we think this in turn stimulates and encourages settlement.

My basic feeling is that once a case has advanced to the appellate level, the likelihood of settlement is fairly remote. I would think that the chances of settling a case are much greater before final judgment at the trial level, so I do not really think that there is as much demand or need for settlement procedures at the appellate level.

So you feel that a judge should not impose his personality into settlement at all; that it might be interpreted as a little pressure upon counsel?

My experience has been that it is not just a "little" pressure; it is a great deal of pressure, and what I consider to be improper pressure. This is why I am so leery about the idea of having a judge press for settlement. It is a very narrow path that he can follow, and it is very easy for him to over-step it and unduly or improperly influence one of the parties to accept a disposition.

Some judges have suggested the creation of a special court to handle Social Security cases. Do you favor such a court? If created, would it significantly cut down on the Fourth Circuit caseload?

My answer is yes and no as to whether I favor such a court.

On the yes side, I would say that it would have a very favorable impact on our caseload, because we have a high percentage of Social Security cases and black lung cases. However, I would temper my approval with a statement that approval is conditioned upon how the court is created and how the judges are to be selected. At the appellate level, at least in our circuit, there is no doubt about the fact that the Secretary of Health and Human Services—through the appeals council, of course, or through the administrative law judges in Social Security cases—does what appears to be a perfectly miserable job. Not all of these errors are corrected by the district courts, and we have the highest reversal rates for these types of cases of any type of case which comes to us. This has been true for the roughly 20 years that I have been a member of the court. When you talk about a special court, if it is to be an administrative court within the Department of Health and Human Services, I would be very, very strongly opposed. If it were set up as a court something like the U.S. Tax Court, I would be in favor of the proposal. I would not insist that the judges be Article III judges, but they must be completely independent of the executive department and carefully chosen.

"I think it most desirable to have a national court, short of the Supreme Court of the United States, which could decide nonconstitutional conflicts between the circuits."

There is no doubt about the fact that if such a court were created, it would significantly cut down our caseload. The Fourth Circuit gets a fair number of what we call "black lung" cases; that is, coalminers who are claiming benefits because of pneumoconiosis. These are in West Virginia, western Virginia, and some in western Maryland. We also get out-and-out Social Security cases, such as claims for disability benefits from former laborers and textile workers. We have a not inconsiderable Social Security practice and the reversal rate has been tremendously high. So a Social Security court would help us, because obviously to reverse you must not only hear the case, but also write a reasoned opinion as to why the case is reversed, and this takes time.

Do you favor a national court of appeals?

Here again, mine is a yes and no answer. In concept, I favor the idea, because I think it is important, when we have a national government and we supposedly have one set of rules which apply throughout the Nation, that there be a tribunal which can decide conflicts between the circuits. I fully recognize that in this day and age, the Supreme Court of the United States can no longer do this, especially with regard to nonconstitutional conflicts. So from that standpoint, I think it most desirable to have a national court, short of the Supreme Court of the United States, which could decide nonconstitutional conflicts between the circuits. Constitutional conflicts, it seems to me, are more appropriately for the Supreme Court, even in the first instance.

My reservation about the proposed court is, how are the judges going to

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e selected? I am not so concerned bout whether they are selected by ne Chief Justice or whether they are elected by the President or whether ney are selected in some other way, as am about the fact that they not be elected from the present circuit judg-—at least, the circuit judges of the ourth Circuit—because we are so northanded at the moment that I do ot think that we could continue to nction if we were required to give o one more judge even on a part-me basis.

Have you asked for more judge-ips?

We have asked for more. The Judi-al Conference of the United States as recommended that we receive ur more and the legislation to au-orize them has been introduced and pending before Congress. owever, I do not expect anything to ppen for the next year or so.

What are your views of the uidelines promulgated by the Sen-ncing Commission and now before ongress for review? Did you or her judges in your circuit offer crit-sm when the commission had pub-hearings?

I know, of course, that the original port of the commission was widely ticized, at least informally, by the dges, and particularly the district dges of the circuit, primarily on the ounds that it removed too much of eir discretion in adjusting a sen-nce to fit a particular situation. I, of urse, agree that a sentencing judge ould have a fair amount of discre-n in this regard, and certainly it is y impression that the final report—at is, the proposal which is now nding before the Congress—re-ores a great deal of that discretion. I ow, nevertheless, that the proposal also being criticized by some of the strict judges in the circuit, again on e ground that too much of their dis-tion is removed, that the formula determining a sentence in a par-ular case is too complicated, and the e. To me, the overall objective of Congress in setting up the commission, in trying to eliminate disparity in sentencing, is a thoroughly commendable one. I have often felt, particularly in the area of prisoner's rights, in cases which have come up under the jurisdiction to issue a federal writ of habeas corpus, that some bad law has been made by some very tough, very difficult cases, because of exorbitant sentences imposed by state judges, and there is a natural inclination on the part of somebody who views the situation compassionately to find some relief for such an unjust sentence. I do think if the Congress approves the guidelines that there should be a greater delay than November of this year in putting them into effect, because I think all judges are going to need a lot more education, demonstration, and practice on how to apply them properly than we can hope to achieve between now and November.

How do you feel about taking on all the extra work of reviewing the sentences that will now come to the courts of appeals?

Well, I am not asking for additional work, but I have always been in favor of appellate review of sentences. I think that appellate review of sentences can avoid some of the disparity that we are all upset about. I do not welcome the extra duties, but I certainly welcome the authority to review a sentence, particularly where the sentence appears to be out of line for one reason or another.

Fourth Circuit opinions are circulated to all members of the court, including those who did not hear argument, a procedure not followed in all circuits. How long have you had this procedure in effect?

It has been in effect ever since the court grew from three members to five in 1961. It had existed, however, even when there was a court of only three judges, back in the days when I was a law clerk, when there was a senior judge who participated in the work of the court from time to time. So in essence, when you ask me how long has it been in effect, the answer is it has always been in effect.

There are two justifications for the practice at least that I can identify. The first and perhaps the more important one is that it is an effort to achieve continuity in the opinions in the court. And with the court's growth, it is now possible to have two panels of the court presented with the same

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questions to be sitting concurrently without a single judge on either panel being on the other. One of the reasons for circulating the opinions is to avoid the possibility that one panel will decide a question one way and another panel will decide the same question another way. This, I think, I have noticed in viewing opinions, say, of the Ninth Circuit and of the Second Circuit, where this practice has not been followed.

some are not formally briefed and many are decided on the papers, simply on an informal brief from the parties. The opinions in those cases used to be circulated to all of the judges. We found, however, that we had to discontinue our circulation there. We could not keep up with what each other was doing and still do our own work. Circulation is now limited to cases which are put on the calendar for argument.

I am concerned about whether, if

"We recognize the right of . . . judges [who did not sit on the panel] to comment [on opinions], and this is a right which is freely exercised in this circuit and is a very valuable one."

The other reason for doing it is, many times a non-sitting judge, one who is not a co-panelist on the case, will have some thoughts on the subject and will have a legitimate criticism, or somebody who is not thoroughly familiar with the case will find an obscurity in the opinion which he wants to call to the attention of the author. We recognize the right of non-sitting judges to comment, and this is a right which is freely exercised in this circuit and is a very valuable one. For the most part, the comments of non-sitting judges are extremely helpful to those who are charged with the responsibility of deciding the case.

In some of the circuits the opinions are not circulated until they are filed. It is much more difficult to resolve an inconsistency, say, by rehearing a case en banc, and a lot more wasteful to do it that way, than to spot an inconsistency at the deliberations level and attempt to work out some accommodation before any opinion is released.

To comment further on this matter of circulating opinions to all judges, let me say that we initially did it in all cases, including prisoner cases—that is, mostly habeas corpus cases or motions under 18 U.S.C. § 2255, where

and when we ever become a court of 15, we will be able to continue the practice. I would not be a bit surprised if, at that time, the volume might become so great that it will be necessary to sacrifice consistency for expediency and efficiency in deciding cases. When we grow it may be impossible for each of us to keep up with everything that everybody else is doing and still do our own work. Perhaps at that time we may have to limit circulation of opinions to all members of the court to those which will be published, as distinguished from those which are to be unpublished and which under our rules are not supposed to be considered as a precedent.

Roughly what percentage of your opinions are published in a year?

Only about 23 percent are being published at the present time, but that is within the range of the other circuits. The significance of publication is that under our rules an unpublished opinion is not to be cited as authority. It can, however, be referred to by counsel if a copy of it is attached as a supplement to the brief. We are not supposed to cite unpublished opinions, but at times we will make reference to an unpublished opinion in a footnote to indicate the rule that we are now formally deciding on a precedential basis is consistent with what we did in the past.

Although the majority of the court does not share my view, I think that anything that the court does has some precedential value, and parties ought to be free to cite whatever the court does. However, I would draw a line between having great persuasive value and having only minor persuasive value. Thus I would think that an unpublished opinion could be overruled if a later panel in a true adversary proceeding concludes that the previous case was wrongly decided, without the need to convene an en banc court. But as I have said, mine is the minority view on the court and I conform to what the majority has decided.

To what do you attribute the large criminal case filings in the Fourth Circuit district courts—the second highest nationally?

There is an explanation for this which is not apparent on the face of it. We are much higher in the area of misdemeanors, not felonies, and the reason is that first of all we have at

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the cases); the percentage of cases involving sanctions applications; and the practices of courts regarding hearings on sanctions (31.6 percent routinely hold an evidentiary hearing; 73.7 percent routinely hear oral argument).

The report will be distributed by the state bar to all federal judges in New York State. The chair of the subcommittee that produced the report is Shira A. Scheindlin, a former magistrate in the Eastern District of New York, currently in private practice.

Copies of the report, *Sanctions and Attorneys' Fees*, are available by contacting the association at One Elk Street, Albany NY 12207, tel. (518) 463-3200. ■

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ast two areas in which misdeeanors frequently occur. Half of the altimore–Washington Parkway is a deral road, and as a consequence, if ou are guilty of reckless driving or peeding or another serious traffic ofnse, you are guilty of a federal ofnse. The same is true of the Eastern istrict of Virginia where National irport is located. We even have apeals in a certain number of cases of ghts between taxi drivers and the olice at National Airport. Also, we ve all the military installations in e Eastern District of Virginia, North arolina, and South Carolina where imes become federal statistics. Anher significant factor is that Virginia, here a lot of these misdemeanors are osecuted under the Assimilated rimes Act, classifies as misdeeanors many offenses that other ates would treat as petty offenses. that when you look at our misdeeanor statistics, it does not really ean that we have significantly more isdemeanor cases than our counterrts elsewhere throughout the coun-. It simply means that we call more ings misdemeanors, at least for statical purposes, than they do. I think u will find that aside from the large minal cases our criminal load is ally not any different from the crimil load in the other circuits. ■

OTEWORTHY, from page 6

ssession of the U.S. Parole Commisn, and rejecting the contention of the vernment that the reports are per se expt from disclosure under FOIA exempns three and five (5 U.S.C. §§ 552(b)(3) d 552(b)(5)). While finding that portions the report may be withheld from dissure, the Ninth Circuit held that the role Commission has a duty under IA to release any nonexempt, segrega portions of a presentence investigation ort when the request is made by the bject of the report. *Julian v. United States p't of Justice*, 806 F.2d 1411 (9th Cir. 1986), t. *granted*, 55 U.S.L.W. 3831 (June 15, 7). ■

THE SOURCE

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Adams, Charles. "Final Offer Arbitration: Time for Serious Consideration by the Courts." 66 *Nebraska L. Rev.* 213 (1987).

Administrative Conference of the United States. *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*. Office of the Chairman, 1987.

Aikman, Alexander B., Mary E. Elsner, and Frederick G. Miller. *Friends of the Court: Lawyers as Supplemental Judicial Resources*. National Center for State Courts, 1987.

Aldisert, Ruggero J. "Philosophy, Jurisprudence, and Jurisprudential Temperament of Federal Judges." 20 *Indiana L. Rev.* 453 (1987).

Bacigal, Ronald J., and Margaret I. Bacigal. "A Case Study of the Federal Judiciary's Role in Court-Ordered Busing: The Professional and Personal Experiences of U.S. District Judge Robert R. Merhige, Jr." 3 *J. of Law & Politics* 693 (1987).

✔Brennan, William J., Jr., "Space Settlements and the Law." (Address given at American Law Institute Annual Dinner, May 21, 1987).

Burger, Warren E. "We The People." 37 *Case Western Reserve L. Rev.* 385 (1986–87).

D'Alemberte, Talbot. "Searching for the Limits of Judicial Free Speech." 61 *Tulane L. Rev.* 611 (1987).

Federal Judicial Workload Statistics—March 1987. Administrative Office of the U.S. Courts, 1987.

Johnson, Charles A. "Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions." 21 *Law & Society Rev.* 325 (1987).

Kronman, Anthony T. "The Problem of Judicial Discretion." 36 *J. of Legal Education* 481 (1986).

Lewis, Anthony. "Preserving the System: The Role of Judges." 14 *Hastings Constitutional L.Q.* 1 (1986).

Lubet, Steven. "Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct." 1986 *Arizona State L.J.* 379 (1986).

Marcus, Richard L. "The Perils of Privilege: Waiver and the Litigator." 84 *Michigan L. Rev.* 1605 (1986).

Mathias, Robert A. *The Road Not Taken: Cost-Effective Alternatives to Prison for Non-Violent Felony Offenders in New York State*. Correctional Association of New York, 1986.

Mathias, Charles McC., Jr. "Advice and Consent: The Role of the United States Senate in the Judicial Selection Process." 54 *University of Chicago L. Rev.* 200 (1987).

McGowan, Carl. "Perspectives on Taft's Tenure as Chief Justice and Their Special Relevance Today." 55 *University of Cincinnati L. Rev.* 1143 (1987).

Meese, Edwin, III. "Promoting Truth in the Courtroom." 40 *Vanderbilt L. Rev.* 271 (1987).

Mikva, Abner J. "Reading and Writing Statutes." 48 *University of Pittsburgh L. Rev.* 627 (1987).

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Miner, Roger J. "Preemptive Strikes on State Autonomy—The Role of Congress." (Address given Feb. 18, 1987.) *The Heritage Lectures, No. 99*. The Heritage Foundation, 1987.

Noonan, John T., Jr., "Education, Intelligence, and Character in Judges (The John Dewey Memorial Lecture)." 71 *Minnesota L. Rev.* 1119 (1987).

Peckham, Robert F. "Asia and U.S. Face Common Problems in Settling Legal Disputes." *Asia Foundation Q.*, Winter-Spring 1987, p. 1.

Peterson, Mark A. *Civil Juries in the 1980s: Trends in Jury Trials and Verdicts in California and Cook County, Illinois*. Rand Corporation, 1987.

Potuto, Josephine R. "The Modern Prison: Let's Make It a Factory For Change." 18 *University of Toledo L. Rev.* 51 (1986).

Powe, Lucas A., Jr. *American Broadcasting and the First Amendment*. University of California Press, 1986.

Powell, Lewis F., Jr. "Justice Harlan." 31 *New York Law School L. Rev.* 417 (1986).

Rampacek, Anne S. "Impact of Rule 11 on Civil Rights Litigation." 3 *The Labor Lawyer* 93 (1987).

Ray, C. L., and M. R. Yogi McKelvey. "The Mandamus Explosion." 28 *South Texas L. Rev.* 413 (1987).

Reed, Scott O. "Judicial Education in Illinois." *CBA Record*, April 1987, at 25.

Rehnquist, William H., Kenneth W. Starr, Alex Kozinski, John Edward Sexton, Mark W. Cannon, and George E. MacKinnon. "A Tribute to Chief Justice Warren E. Burger." 100 *Harvard L. Rev.* 969 (1987).

Remington, Frank J. "The Changing Role of the Trial Judge in Criminal Cases—Ensuring That the Sixth Amendment Right to Assistance of Counsel is Effective." 20 *U.C. Davis L. Rev.* 339 (1987).

"Report of the New York Task Force on Women in the Courts." 15 *Fordham Urban L.J.* 11 (1986–87).

Report on Sanctions and Attorneys' Fees. Committee on Federal Courts of the New York State Bar Association, Subcommittee on Sanctions and Attorneys' Fees, 1987.

Ross, H. Laurence, and James P. Foley. "Judicial Disobedience of the Mandate to Imprison Drunk Drivers." 21 *Law & Society Rev.* 315 (1987).

Rothenberg, Elliot C. "The 'Necessity' to Restrict Appeals to Judicial Prejudice." 21 *New England L. Rev.* 581 (1985–86).

Rubin, Alvin B. "Constitutional Protection for the Barber in Ville Platte." 61 *Tulane L. Rev.* 715 (1987).

Rubin, Alvin B. "Doctrine in Decision-Making: Rationale or Rationalization." 1987 *Utah L. Rev.* 357.

Sadurski, Wojciech. "Conventional Morality and Judicial Standards." 73 *Virginia L. Rev.* 339 (1987).

Sarokin, H. Lee. "Justice Rushed Is Justice Ruined." 38 *Rutgers L. Rev.* 431 (1986).

Seng, Michael P. "Federalism, the Courts and Individual Liberties." 75 *Illinois Bar J.* 310 (1987).

Shapiro, David L. "In Defense of Judicial Candor." 100 *Harvard L. Rev.* 731 (1987).

Stern, Gerald. "Is Judicial Discipline in New York State a Threat to Judicial Independence?" 7 *Pace L. Rev.* 291 (1987).

Subrin, Stephen N. "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective." 135 *University of Pennsylvania L. Rev.* 909 (1987).

Tiedemann, John. "Bad Decisions, Bad Judging: A Glimpse at the Dark Side of the Judiciary." 11 *Nova L. Rev.* 139 (1986).

Tokarz, Karen L. "Women Judges and Merit Selection Under the Missouri Plan." 64 *Washington University L.Q.* 903 (1986).

Tonry, Michael H. *Sentencing Reform Impacts*. National Institute of Justice, 1987.

Umbreit, Mark S. "Victim/Offender Mediation: A National Survey." *Federal Probation*, vol. L, p. 53 (Dec. 1986).

Webster, William H. "Second Annual Ainsworth Memorial Lecture." 33 *Loyola L. Rev.* 5 (1987).

Webster, William H. "Sophisticated Surveillance—Intolerable Intrusion or Prudent Protection?" 1986 *Detroit College of Law Rev.* 1179.

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THE THIRD BRANCH

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New Bureau of Prisons Director Encourages Judges' Interest

J. Michael Quinlan became director of the Bureau of Prisons in July. A Fordham Law School graduate, he holds a master of law degree from George Washington University and joined the Bureau of Prisons as an attorney in 1971. He has been executive assistant to the former director, Norman Carlson; superintendent of a federal prison camp; warden of the Federal Correctional Institution in Otisville, N.Y.; and deputy assistant director and deputy director of the Bureau.

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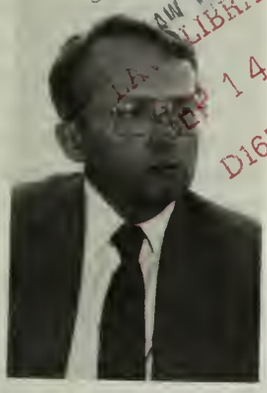

J. Michael Quinlan

Did the position of director bring any surprises with when you took office?

I have been with the agency for 16 years. I had the opportunity, through Norm's guidance, of not only working for him for three and a half years as executive assistant, but also working for him the last 15 months as deputy director. I have had a good exposure to the major issues facing the Bureau of Prisons and feel very fortunate that I have had that foundation and am inheriting an agency that is in outstanding shape.

During these last 15 months, Norm gradually exposed me to managing the Bureau of Prisons and gave me more and more authority. For example, I recently sat in on some National Institute of Corrections committee meetings. Even though I knew Norm attended a lot of meetings, I wasn't cognizant of the extent of involvement of the director of the Bureau of Prisons.

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House Subcommittee on Criminal Justice Hears Testimony on Sentencing Guidelines

Possible delay of the Nov. 1 implementation date for the U.S. Sentencing Commission's sentencing guidelines was a major issue at recent hearings before the House Judiciary Committee's Subcommittee on Criminal Justice, chaired by Rep. John Conyers, Jr. (D-Mich.).

The commission transmitted its guidelines to Congress Apr. 13. They will take effect Nov. 1 unless Congress enacts a delay. The Executive Committee of the Judicial Conference has proposed a delay until November 1988 to allow more time for testing and education. The Administrative Office has transmitted to Congress the text of a proposed amendment that would delay the effective date of the guidelines by one year and solve any "ex post facto" problem by specifying that the guidelines apply only to cases in which the criminal conduct was committed after their effective date.

Members of the Sentencing Commission, including its three judicial members—Chairman William W. Wilkins, Jr. (4th Cir.), Stephen Breyer (1st Cir.), and George E. MacKinnon (D.C. Cir.)—testified July 23 in support of the commission's guidelines, but repeated the commission's proposal to delay their implementation until Aug. 1, 1988. Judge Jon O. Newman (2d Cir.) testified July 22 in favor of the guidelines, suggesting that a six-month, or at most a nine-month, delay in their implementation was enough, stating that a longer delay period was "not advisable."

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Judiciary Celebrates Bicentennial of United States Constitution

The federal judiciary is engaged in a "regular kaleidoscope" of projects and activities to mark the bicentennial of the Constitution, in the words of Chief Judge Howard T. Markey (Fed. Cir.), chairman of the Judicial Conference Committee on the Bicentennial.

The many forms that the judiciary's observance of the Bicentennial has taken include various circuit judicial conferences focusing on the Constitution, including the Third Circuit Fiftieth Judicial Conference in conjunction with the major celebration in Philadelphia Sept. 16–18; special naturalization ceremonies; poster-bearing kiosks in courthouse lobbies; cassettes of the five-film series "Equal Justice Under Law" shown in courthouses to waiting jurors and attorneys; a judge-authored opera; judges speaking and conducting mock trials in schools and courtrooms; debates on constitutional interpretation; speeches at service clubs; court-sponsored essay contests; recorded constitutional messages played in court lobbies and on TV; and distribution of copies of the Constitution.

Chief Judge Markey said that these and other activities reflect the wide variety of efforts under way within the judiciary as it participates in what Chief Justice Warren E. Burger (ret.), chairman of the national Commission on the Bicentennial of the U.S. Constitution, has described as a national "civics lesson" from which all can learn.

The Judicial Conference Committee and local court committees have worked with the national commission, for example, in connection with the traveling exhibition on the Magna Carta.

On Celebration of Citizenship Day, Sept. 16, President Reagan, Chief Justice Burger (ret.), Supreme Court Justices, Senators, Representatives, and District of Columbia area school children will gather on the steps of the Capitol. Through nationwide hook-ups, courts, state legislatures, and private businesses will be joining in national ceremonies and conducting their own local programs honoring the Constitution on Celebration of Citizenship Day.

GUIDELINES, from page 1

Other witnesses, such as Judges Gerald W. Heaney (8th Cir.) and Gilbert S. Merritt (6th Cir.), expressed serious reservations about the guidelines.

Commission members Ilene H. Nagel, Judge William W. Wilkins, Jr. (chairman), and Helen G. Corrothers (left to right) listen to the testimony of fellow commissioner Judge George E. MacKinnon.

Judge Heaney questioned whether the guidelines would eliminate sentencing disparity but suggested they would increase the federal prison population, appellate workload, and plea bargaining. Judge Merritt favored a delay in the implementation of the guidelines, during which a pilot project of field-testing them would be conducted.

Judges Gerald B. Tjoflat (11th Cir.) and A. David Mazzone (D. Mass), members of the Judicial Conference Ad Hoc Committee on Sentencing Guidelines, appeared before the subcommittee to present the Judicial Conference Executive Committee's request for a 12-month delay.

Judge Tjoflat, chairman of the Committee on Administration of the Probation System of the Judicial Conference and a member of the FJC Committee on Sentencing Guidelines Education, stressed to the subcommittee that "the probation officer will play a significantly different and more time-consuming role" under the new law, thus requiring "extensive" training.

Judge Mazzone, chairman of the FJC Committee on Sentencing Guidelines Education, described the extent of the education and training that will be required for probation officers, judges, magistrates, staff attorneys, and federal public defenders. He pointed out that each district will have to amend its local rules to provide a procedure for the sentencing hearing, and that a way will have to be found to ensure that the courts of appeals get transcripts in non-Criminal Justice Act cases. In addition, he pointed out that the courts of appeals will need an expedited procedure for processing appeals, lest the sentence expire prior to appellate review. Judge Mazzone also expressed concern about the potential strain on judicial resources as a result of the guidelines.

Judge Edward R. Becker (3d Cir.), also a member of the Committee on Sentencing Guidelines Education, shared many of Judge Mazzone's views, calling for a nine-month implementation delay.

Samuel J. Buffone, a representative of the ABA, urged a 24-month delay in implementation of the guidelines to allow for their refinement and for education of the bench and bar.

Judges Gilbert S. Merritt, Gerald W. Heaney, and Jon O. Newman join former judge Marvin E. Frankel and Rep. John Conyers, Jr. (left to right) in a discussion prior to the hearing.

The subcommittee also heard testimony from former District Judge Marvin E. Frankel of New York, who supported the guidelines process, and from other witnesses. Judge Thomas A. Wiseman, Jr. (M.D. Tenn.) has also testified before the subcommittee, and Judge G. Thomas Eisele (E.D. Ark.) is scheduled to testify at a later date.

Senator Alan J. Dixon (D-Ill.) has separately introduced a bill to extend by 18 months the effective date of the sentencing guidelines. ■

THE THIRD BRANCH

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LEGISLATION

Prior to its August recess, Congress onsidered or voted on a number of ieasures of interest to the judiciary.

• The House passed H.R. 2763, the Y 1988 appropriations bill that in-ludes the judiciary. The appropria-ons for the courts of appeals, district ourts, and other judicial services ere cut from $1,374,378,000 to ,288,660,000, a 6 percent reduction. efore passing H.R. 2763, the House so voted in favor of an additional 2.4 ercent cut in the $14 billion measure. ie cuts in their entirety are being ppealed to the Senate Appropria-ons Committee.

• Although the House Appropria-ons Committee approved a provi-on to abolish diversity of citizenship a basis of federal court jurisdiction, e full House struck the provision om H.R. 2763 (see above) on a pro-dural point against including licy-changing legislation in an ap-opriations measure. Rep. Robert W. stenmeier (D-Wis.), chairman of e House Judiciary Committee's Sub-committee on Courts, Civil Liberties, and the Administration of Justice, stated that his subcommittee will try to report legislation on diversity jurisdiction, similar to the legislation that was stricken by the House.

• New language amending Fed. R. Crim P. 30 and Fed. R. Civ. P. 51 became effective Aug. 1. The rules changes provide that a "court may instruct the jury before or after the arguments are completed or at both times." The language modifying the rules was transmitted to Congress Mar. 9 by the Chief Justice on behalf of the Supreme Court, and under the rules amendment process was scheduled to take effect Aug. 1 unless Congress voted otherwise. The House Judiciary Committee's Subcommittee on Criminal Justice held an oversight hearing in July on the proposed changes, at which Stephen A. Saltzburg, the reporter of the Judicial Conference's Advisory Committee on Federal Rules of Criminal Procedure, testified that the proposed amendments would provide judges with enhanced flexibility in instructing jurors. An ABA

See LEGISLATION, page 5

200 Years Ago...

September 1787: On Sept. 8, the convention elected a "Committee of Style" to write a final draft of the Constitution from the draft it had been debating since early August. The five-member committee, whose chief pen probably belonged to Gouverneur Morris (Pa.), worked numerous stylistic changes and two of a more substantive nature.

First, the preamble reported in August would have proclaimed that "We the people of the States of New Hampshire [etc., listing all thirteen] do ordain, declare and establish the following Constitution for the government of ourselves and our posterity." As the convention had since decided that any nine states could ratify the Constitution, it was necessary to omit mention of the individual states in favor of "We the people of the United States . . . ," to which Morris added an itemization of constitutional goals.

Second, the committee's draft in Art. I, § 10, prohibited the states from passing "laws altering or impairing the obligation of contracts," a provision the convention approved with slight change—even though it had rejected such a provision in late August.

On Sept. 17, the convention approved the Constitution, which Washington sent to the Congress, requesting that it be submitted for ratification and noting that it was "the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."

BICENTENNIAL OF THE U.S. CONSTITUTION

enter Invites Courts to Report nnovations in Judicial Management

In meeting its statutory mandate at it further "the development and option of improved judicial admin-ration in the courts of the United ates," 28 U.S.C. § 620(a), the Center times brings together one court th a problem and another court that s found a solution to that problem. Center efforts in this regard take a mber of forms. They include Re-rch Division reports on court inno-ions, with specific details on the eration and administration of such grams. *Partial Payment of Filing Fees Prisoner In Forma Pauperis Cases in eral Courts: A Preliminary Report* 84) covered the Northern District Ohio's requirement of partial pay-nt of filing fees to discourge frivo-s filings by prisoners; the report, including locally produced forms, serves as a kind of how-to-do-it manual for other courts. *The Joint Trial Calendars in the Western District of Missouri* (1985) is another example of similarly documented experience, reporting on a joint trial calendar used there to avoid or reduce calendar congestion.

Staff of the Research Division who learn how individual courts are dealing with particular problems can serve as valuable sources of information to other courts within the system. Moreover, information on locally generated responses to problems is also conveyed through the Center's Information Services Office in response to specific information requests.

For the Center to disseminate information about innovative approaches developed by courts in areas of court administration and management, it must first learn of innovations that have been tried and proved successful. The Center, therefore, invites all members of the judicial family to report innovations that have been effective in resolving problems that might affect other courts. ■

Boadwine Named Circuit Executive for 8th Circuit

Ms. Boadwine is sworn in by Chief Judge Lay.

Chief Judge Donald P. Lay (8th Cir.) has announced that the Judicial Council of the circuit has appointed June L. Boadwine of St. Paul, Minn., as circuit executive.

Ms. Boadwine is a native of Watertown, S.D. She served as an assistant and office manager for a Watertown law firm and then as executive secretary to Judge Myron H. Bright (8th Cir.). In 1983, she became administrative assistant to Chief Judge Lay, and in October 1985 was appointed acting circuit executive. Ms. Boadwine is a graduate of the Institute for Court Management.

PERSONNEL

Nominations

David C. Treen, U.S. Circuit Judge, 5th Cir., July 22

Michael B. Mukasey, U.S. District Judge, S.D.N.Y., July 27

William L. Dwyer, U.S. District Judge, W.D. Wash., July 28

Sam R. Cummings, U.S. District Judge, N.D. Tex., July 31

Richard L. Voorhees, U.S. District Judge, W.D.N.C., July 31

Wade Brorby, U.S. Circuit Judge, 10th Cir., Aug. 7

Robert E. Cowen, U.S. Circuit Judge, 3d Cir., Aug. 7

Stephen S. Trott, U.S. Circuit Judge, 9th Cir., Aug. 7

Richard J. Arcara, U.S. District Judge, W.D.N.Y., Aug. 7

Nicholas H. Politan, U.S. District Judge, D.N.J., Aug. 7

Confirmations

Larry J. McKinney, U.S. District Judge, S.D. Ind., July 17

Philip M. Pro, U.S. District Judge, D. Nev., July 22

William D. Hutchinson, U.S. Circuit Judge, 3d Cir., Aug. 5

Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., Aug. 5

T. S. Ellis, III, U.S. District Judge, E.D. Va., Aug. 5

Charles R. Wolle, U.S. District Judge, S.D. Iowa, Aug. 5

John D. Tinder, U.S. District Judge, S.D. Ind., Aug. 7

Appointments

Michael S. Kanne, U.S. Circuit Judge, 7th Cir., May 21

Reena Raggi, U.S. District Judge, E.D.N.Y., May 26

Ronald S. W. Lew, U.S. District Judge, C.D. Cal., May 29

Joseph P. Stadtmueller, U.S. District Judge, E.D. Wis., June 1

Richard J. Daronco, U.S. District Judge, S.D.N.Y., June 8

Resignation

Susan Getzendanner, U.S. District Judge, N.D. Ill., Sept. 30

Senior Status

Donald R. Ross, U.S. Circuit Judge, 8th Cir., June 13

Deaths

H. Kenneth Wangelin, U.S. District Judge, E.D. Mo., June 10

William Ray Overton, U.S. District Judge, E.D. Ark., July 14

NOTEWORTHY

Supreme Court strikes down district court bar residency requirement. The Supreme Court has invalidated local rules of the Eastern District of Louisiana that required residence or the maintenance of an office in Louisiana as a condition of admission to and continued membership in the bar of the district court. *Frazier v. Heebe*, 55 U.S.L.W. 4877 (June 19, 1987). Frazier, who lived in and maintained his law office in Mississippi, petitioned for a writ of prohibition from the Fifth Circuit, alleging that the restrictions contained in the local rules were unconstitutional. The Fifth Circuit remanded to the Eastern District, all the judges of which recused themselves. The matter was assigned to Judge Edwin Hunter (W.D. La.), who denied Frazier's petition for extraordinary relief and dismissed the suit after a one-day bench trial. The Fifth Circuit affirmed, finding that the discrimination at issue did not warrant heightened scrutiny, and holding that the exclusion of such attorneys was rationally related to the district court's goal of promoting lawyer competence and availability for hearings. The Supreme Court reversed. Pursuant to its supervisory authority, it invalidated the local rules, finding that both the residency and in-state office requirements were "unnecessary" and arbitrarily discriminated against out-of-state practitioners.

Third Circuit task force on rule 11 sanctions. Chief Judge John J. Gibbons (3d Cir.) has established a task force to study the implication of sanctions under Fed. R. Civ. P. 11. The group is chaired by Chief Judge John P. Fullam (E.D. Pa.). University of Pennsylvania Law Professor Stephen B. Burbank is the reporter. Other members include Judge Alan N. Bloch (W.D. Pa.), FJC Director Emeritus A. Leo Levin of the University of Pennsylvania Law School, Third Circuit Executive William K. Slate II, New York University Law Professor Linda Joy Silberman; Melville D. Miller, Jr., director of New Jersey Legal Services; and attorneys from Delaware, New York, Pennsylvania, New Jersey, and Illinois. Persons interested in bringing rule 11 issues to the attention of the task force are invited to contact Mr. Slate. The task force will also consider the effect of sanctions under Fed. R. Civ. P. 26(g).

See NOTEWORTHY, page

EGISLATION, from page 3

epresentative testified in opposition
the proposed changes. Following
ie hearing, Congress took no action
prevent the rules changes from tak-
g effect as scheduled.

The House Judiciary Committee's
ubcommittee on Criminal Justice
so held an oversight hearing on
nendments to the RICO chapter of
U.S.C.

• A hearing was held on two Sen-
e bills introduced by Sen. Howell
eflin (D-Ala.), chairman of the Sen-
e Judiciary Committee's Subcom-
ttee on Courts and Administrative

OTEWORTHY, from page 4

Judicial immunity. The doctrine of judi-
l immunity applies to a board of bar
ıminers and a character and fitness
nmittee, the Sixth Circuit affirms. An
successful applicant to admission to the
in Kentucky brought an action under
U.S.C. § 1983 against the Kentucky
mmittee on Character and Fitness, its
mbers, two of its employees, a member
the Board of Bar Examiners, and the
ef justice of Kentucky's Supreme Court.
plaintiff alleged, inter alia, that his
stantive and procedural due process
its had been violated. He alleged that
en he was first a candidate for admis-
n to the Kentucky bar, an associate
mber of the character and fitness com-
tee who had interviewed him ad-
ssed a letter to the State Board of Bar
miners stating that the applicant was
possessed of the requisite character
fitness. The applicant claimed to have
knowledge of this recommendation,
proceeded to take the bar exam four
es.

he district court concluded that the
ctions of the Board of Bar Examiners
the character and fitness committee
not be divorced from the actions of the
reme Court of Kentucky," that their
vities were "clothed with judicial im-
nity," and dismissed the complaint.
Sixth Circuit affirmed, both as to the
f justice and as to the non-judge de-
lants. "The act of considering an ap-
ition to the bar is a judicial act. And it is
ess a judicial act simply because it is
ormed by nonjudicial officers . . . on
alf of the judiciary," the Sixth Circuit
. *Sparks v. Character & Fitness Comm.*,
F.2d 541 (6th Cir. 1987). ■

Practice, which would provide counsel the opportunity to question prospective jurors in both civil and criminal cases. S. 953 would amend Fed. R. Civ. P. 47(a) and S. 954 would amend Fed. R. Crim. P. 24(a) to require the federal courts to permit counsel to participate in voir dire. The Judicial Conference opposes the proposed amendments, while the ABA and the National Association of Criminal Defense Lawyers support them.

• Three bills have been introduced that are intended to reverse or limit *Pulliam v. Allen*'s effect on judicial immunity. Sen. Heflin and Sen. Orrin Hatch (R-Utah) introduced S. 1515, intended to address both the attorneys' fees and injunctive relief aspects of *Pulliam*. The bill would amend 42 U.S.C. § 1988 and 42 U.S.C. § 1983. Another bill, S. 1512, was introduced by Sen. Hatch with Sen. Strom Thurmond (R-S.C.) and Sen. Heflin as cosponsors. It addresses only the attorneys' fee issue raised by *Pulliam*, by proposing to amend § 1988.

Finally, § 614 of S. 1482, the Judicial Branch Improvements Act of 1987, would also limit the *Pulliam* holding as to attorneys' fees, as recommended by the Judicial Conference. The act also incorporates a number of other Judicial Conference recommendations (see *The Third Branch*, June 1987, at 2, and August 1987, at 5).

• S. 548, passed by the Senate, includes a provision amending the 1986 bankruptcy legislation (Pub. L. No. 99-554) to make clear that bankruptcy cases filed under Chapter 11 by family farmers prior to the enactment of the 1986 act can be converted from Chapter 11 to Chapter 12 filings (see *The Third Branch*, July 1987, at 7).

• H.R. 3002, to amend ch. 215 of 18 U.S.C. to provide certain rights for persons who are subject to grand jury investigation, was introduced by Rep. Harold Ford (D-Tenn.).

• During consideration of funding for the National Childhood Vaccine Injury Act (see *The Third Branch*, Feb. 1987, at 2), lawmakers at the subcommittee level of the House Committee on Ways and Means expressed reservations about funding the act beyond the extent of cases in which the injury has already occurred. ■

New FJC Study Finds Decrease in Summary Judgments

The number of summary judgments under Federal Rule of Civil Procedure 56 appears to have decreased in recent years, at least prior to three recent Supreme Court decisions clarifying the standards for summary judgment. A study recently published by the Center, *Summary Judgment Practice in Three District Courts*, by Joe Cecil and C. R. Douglas, found that although summary judgment motions were filed in approximately the same percentage of cases in early 1986 as in 1975, the percentage of cases terminated by summary judgment decreased by approximately one-half over the 11-year period examined.

The study also found that summary judgment motions by defendants are far more common than summary judgment motions by plaintiffs and are especially common in multiparty cases. Approximately one-third of the motions are granted in whole or in part, one-third are denied, and no action is taken by the court in the remaining third. A review of findings in other studies indicated that summary judgments are reversed on appeal at a rate that closely approximates the overall rate of reversal for all civil appeals.

After these data were collected, several decisions by the Supreme Court clarified the standards for summary judgment in a way that may result in an increase in summary judgments. The findings presented in this 12-page paper provide a measure against which any such change may be assessed.

Copies of the paper can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed unfranked mailing label, but do not send an envelope.

QUINLAN, from page 1

Did you have any specific changes in mind when you became director?

Norm has left the agency in great shape, to build upon, not to really change. Some of the things that I am emphasizing in my early days as director would have changed even if Norm were still here. He was part of the process and very much supported these changes.

My biggest concern is the growing inmate population. In 1981, our population was 24,000; today it is 44,000. The Bureau of Prisons has grown 83 percent in six and a half years and is now 58 percent over its design capacity. The projections with the sentencing guidelines and the Anti-Drug Abuse Act indicate that there may be as many as 100,000 people in federal prisons by 1997. What we are trying to do is not only ensure that we have the resources to house these people, but more importantly to ensure that we have the best staff to manage the facilities we will have to operate. My major initiative since becoming director, and part of the time as deputy director, has been a new emphasis on human resource development—emphasizing new techniques in recruitment, new programs for training, and, most importantly, new career development programs that will enable the Bureau of Prisons to identify at the earliest possible stage the potential managers and leaders of tomorrow, give them training opportunities and cultivate them to the point where they can become leaders. Most of our training is done in Glynco, Ga., at the Federal Law Enforcement Training Center. We have excellent instructors that train all new employees for three weeks—three weeks of training for every new employee in the Bureau of Prisons, whether they be a correctional officer, a doctor, a chaplain, a teacher, a secretary. This training includes self-defense, firearms, and training in interpersonal relationships.

What continuing training do employees get?

Every year employees receive 40 hours of training at their institution. There are also other training programs offered—supervision courses for new managers and specialty training for case managers, unit managers, and security officials.

Our primary emphasis is on security, obviously. We can't become complacent about our initial responsibility to deal with the security and safety of institutions. But we also must train people, as they move up the ranks, in how to manage, how to develop, how to motivate, how to encourage and train other people to do the kinds of things that are necessary in an institution to make it safe and humane.

Did you have an opportunity to have some input into the sentencing guidelines?

Norm had an opportunity to testify on the guidelines process. He was generally supportive of the process, but concerned that prisons be reserved for those most needing confinement: the violent and those who commit the most serious crimes. I had an opportunity to testify before the commission on the issue of the death penalty, which we support for those inmates already serving multiple life sentences who murder again while in prison.

We have also had a dialogue on almost a weekly basis with Judge Wilkins, Michael Block, Helen Corrothers, and other members of the commission on different issues that relate to the Bureau of Prisons, particularly the impact of the guidelines on our population, the kinds of prisons that might be needed, and things of that nature. We also have a staff member detailed to the commission on almost a full-time basis to work on the issue of population projections.

"My biggest concern is the growing inmate population. In 1981, our population was 24,000; today it is 44,000."

What is your stand on privatization?

We have been involved in privatization for a long time in terms of private operation of halfway houses. We have 3,200 federal prisoners currently serving time in privately run halfway houses. We also have been using private contracts for a number of years for housing specialty-type offenders—females, juveniles, sentenced aliens. We combine our efforts with those of the Immigration Service in Texas and Colorado for the housing of

sentenced aliens, and we contract out certain functions such as medical and food services.

We have had mixed experiences in both of these areas, but we are willing to pursue privatization further. One of the initiatives that the administration is looking at and analyzing is the services offered by the private sector. At this point, no one has any experience doing what we do in terms of providing medium or maximum security prison operations. All of the efforts in privatization have been at the lower end of the security spectrum, at the minimum security level. And the analyses that we have done have shown that we can do it more cost-effectively because of our staff to inmate ratio. The cost of feeding is very low; we average about $2.35 a day per inmate in institutional feeding. We have found that comparing all the costs, including capitalization, depreciation, staff retirement, and overhead cost in the central and regional offices—when you add all those in, we are still 20 percent under the costs available in the private sector. So, in looking at privatization, we have found that nobody is yet ready or able to compete with us in a cost-effective manner.

There are some very serious policy questions involved in the privatization issue: whether it is legal, whether, as a policy initiative, we want to do it. American University Professor Ira Robbins has been studying the privatization of corrections as part of the ABA Criminal Justice Committee, and we expect a report some time later this year.

What is the Bureau's relationship to the National Institute of Corrections?

The National Institute of Corrections, as a part of the Bureau of Prisons, is able to provide training to a couple of different target groups—primarily to mid-level managers as they become potential leaders of state and local correctional agencies. They also focus on training trainers, so that state personnel can go back and train others. They have a technical assistance responsibility by which they provide an expert to a state or local government to improve, for example, security, case management, unit management, or prison design. They have been focusing a lot of their attention most recently on two very critical issues—AIDS and overcrowding.

How much input does the Bureau have in designating the place of incarceration of a convicted defendant?

We—the attorney general and the director of the Bureau of Prisons—have the authority to designate where a prisoner is going to serve his or her sentence. Many times judges call before sentencing and they make recommendations. They say, "If I sentence this fellow to 15 years, and he's got this kind of a history, where would you want to put him?" or "Would you mind if I recommended that he go to Fort Worth?" We look at the case and call the judge back and say, "Fort Worth would be fine," and the judge will recommend Fort Worth. But generally speaking, most judges will not call first; all they will do is make a recommendation, which we will always try to fulfill and honor. But there are cases in which we cannot do that. There may be people at the prison recommended by the judge who would be a threat to that prisoner, or the prison may not provide enough security based on our analysis of the prisoner's security needs, or there may be a medical problem that needs to be addressed in one of our medical facilities. If we cannot honor the court's recommendation, we will write the judge and explain our reasons.

Will the Bureau be recommending that more prisons be built?

The Department of Justice will be recommending to the Office of Management and Budget and to the Congress additional building to meet the overcrowding that we have. We have already received new resources to cope with the problem of growth. In fact, since 1981, we have added 4,500 beds to our capacity. In addition, we

See QUINLAN, page 8

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, Information Services, 1520 H Street, N.W., Washington, DC 20005.

Althouse, Ann. "How To Build a Separate Sphere: Federal Courts and State Power." 100 *Harvard L. Rev.* 1485 (1987).

Brennan, William J., Jr. "Tribute to Justice Thurgood Marshall." 40 *Arkansas L. Rev.* 661 (1987).

Brest, Paul. "Congress as Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine." 21 *Georgia L. Rev.* 57 (1986).

Committee on Federal Courts. "Budget Deficits and the Federal Courts." 42 *Record of the Association of the Bar of the City of New York* 673 (1987).

Burbank, Stephen B. "Politics and Progress in Implementing the Federal Judicial Discipline Act." 71 *Judicature* 13 (1987).

Coffin, Frank M. "The Law School and the Profession: A Need for Bridges." 11 *Nova L. Rev.* 1053 (1987).

Colby, Paul L. "Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions." 61 *Tulane L. Rev.* 1041 (1987).

Davis, Peggy C. "'There Is a Book Out . . .': An Analysis of Judicial Absorption of Legislative Facts." 100 *Harvard L. Rev.* 1539 (1987).

Dumbauld, Edward. "Protest and Triumph: The Bill of Rights," in *Pennsylvania and the Federal Constitution*. Pennsylvania Historical Association, 1987.

Flanders, Steven. "Judicial Discipline, Criminal Prosecution and Impeachment." 11 *Justice System J.* 394 (1986).

Griswold, Erwin N. "The Federal Courts Today and Tomorrow: A Summary and Survey." 38 *South Carolina L. Rev.* 393 (1987).

Heydebrand, Wolf, and Carroll Seron. "The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts." 11 *Justice System J.* 303 (1986).

Lay, Donald P. "The Constitution, the Supreme Court, and Mr. Meese: Habeas

See SOURCE, page 10

QUINLAN, from page 7

have 7,000 beds currently under construction, including 7 new institutions, and we have 2,400 additional beds in our FY 1988 budget request pending before the Congress.

For the most part, our cells are designed for one person; however, almost universally around the federal prison system, there are now two people in those rooms except at the highest level security facilities, such as Marion, and at other penitentiaries.

Part of the FJC orientation program for newly appointed judges includes a day at a federal correctional facility. Does the Bureau make other arrangements for judges to visit prisons?

Well, there are a number of judges who really are very active in visiting federal institutions. I would like to encourage judges to visit more of our institutions, in addition to those they are exposed to when attending Sentencing Institutes. I would like to encourage judges to take the time because I think a very important part of the relationship between the federal judiciary and the Bureau of Prisons is their understanding of exactly what our role is, how we carry out our duties and responsibilities and how the prisoners are living in terms of the sentences that they impose. I think that it is very important that judges have a comfortable feeling about how the prisoners are being housed.

I would say that for the most part people in general do not understand what prison life is like, particularly life in federal prison. Our reputation, and the expectation, I suppose, of what prison is like is based solely on television and movie depictions of correctional institutions. Sometimes correctional staff are depicted in a very negative way, and it is important that we show as many people as possible, particularly federal judges, what a professional organization this is and how proud we are of the job we do.

I intend to write to all new federal judges and invite them to come and visit our institutions. I also intend to send at the end of each year a "state of the Bureau of Prisons" report to all federal judges, or at least to those who express an interest in having that kind of report, in which I can bring them up to date on where we are in terms of our population, in terms of the problems, in terms of drug programming and things of interest to the court, study and observation cases—how many we have done, etc.

"I would like to encourage judges to visit more of our institutions."

We also have, through the Sentencing Institutes that we participate in with the Judicial Center, active involvement in trying to meet as many members of the judiciary as possible. We encourage them to call us if they have questions or concerns.

The press sometimes refers to "country club" incarceration. Is there such a thing?

I have been superintendent of a facility in Florida known as Eglin Air Force Base Federal Prison Camp, and people have called Eglin a "country club." But I never met a prisoner who served time in that facility, nor have I ever heard from anyone, who said that they wanted to come back. I think inmates respect the fact that we treat them as human beings and that they are given an opportunity to work and to have recreation and to participate in education programs. The environment may look good, but deprivation of freedom is central to what prison and removal from society is all about—and nobody volunteers to come in.

How has AIDS affected the Bureau's mission?

First of all, AIDS has not been a major problem thus far, although from all projections, it is going to become a greater problem in the future. Since 1981, when statistics were first kept on inmates with AIDS, we have had a total of about 80 people in federal prisons who have had AIDS, most of whom have subsequently died or been released. We have now about 25 men and women in federal prison who have AIDS. We also have an additional group who have AIDS-Related Complex (ARC), and we also have prisoners who have been tested and have been found positive for the HIV virus [the virus suspected of causing AIDS]. That group—the ARCs and the positives for the virus—amounts to about another 200 prisoners out of the 44,000 total in the system.

As of June 15, we began testing all newly received sentenced prisoners and all prisoners 60 days before release. The results of those tests are just starting to come in, so we do not have any data yet. However, it is expected that we will continue the tests on all newly received sentenced prisoners through the end of September and that we will then evaluate whether we should continue that program.

At this point, we only separate those prisoners who have the full-fledged illness. If they are male, they are housed at our medical center in Springfield, Mo., and if they are female, at the medical center in Lex-

ington, Ky. All of the prisoners who have the virus, or those who have ARC (which means that they have had a symptom of the disease but it is now in remission) are kept in the prison where they first developed the problem. If it is a security problem in terms of it being too widely known that they have the disease, then they are transferred to another facility. At this point we are maintaining that those prisoners should be kept in the mainstream of the prison population. We do not advertise the fact that they are positive or that they have ARC. We keep it confidential except from the doctor, the captain, the warden, and other key staff. We also will tell the probation officer and the community program manager when the prisoner is about to be released. For the most part we have not had a problem. We have had a couple of isolated cases where an inmate has bitten a staff member—one such prisoner was recently convicted of assault.

There is always new information on how many prisoners are infected. We are successful now in mainstreaming, but we may at some time get to the point where we have to do more in terms of separation. One of the things I would like to point out is that of all the AIDS and ARC cases that we have had thus far over 90 percent have been related to drugs and not homosexuality. The reverse is true in the community at large, where only a small percentage have been related to intravenous drug abuse, and the majority has been related to homosexual or bisexual activity. When you think of AIDS in prison, you have to recognize the fact that over 50 percent of the people who are coming into federal prisons these days have drug histories. And many of them have prior IV drug histories, where they used drugs through needles. That's where we are going to face our biggest challenge, in dealing with these prisoners.

We developed over a year ago a mandatory AIDS training program. Every staff member and every inmate is shown this 30-minute videotape about how AIDS is transmitted, and how it can be prevented. When we find prisoners are infected with the disease we offer counseling from two perspectives: We want to record their progress and counsel them from a medical and psychological perspective.

"As of June 15, we began testing all newly received sentenced prisoners [for AIDS] and all prisoners 60 days before release. . . . When you think of AIDS in prison, you have to recognize the fact that over 50 percent of the people who are coming into federal prisons these days have drug histories."

Up until recently we did not test inmates for AIDS when they entered prison. But if a prisoner was being treated in a hospital for a cold that would not go away, the doctor might say, "I am very suspicious, this cold has been with you for two months. I am going to test you for AIDS." At that point, if the tests came back positive, the doctor and the psychologist would start counseling that individual. They would make sure he was aware of the kinds of things that must be done from a medical standpoint: how you can prevent transmission, how it could be transmitted to others, how to deal with it from a mental health and psychological standpoint, and how to cope with the fact that you have the disease or may get it. We emphasize counseling because there is no treatment.

But of the 44,000-plus prisoners, would it be true that the vast majority have never been tested for AIDS?

A year and a half from now, the vast majority *will* have been tested if we continue, which I expect we will, this testing program. I am not saying we *are* definitely going to do it.

If a prisoner has a positive test result, nothing really has changed. There is no treatment provided; you can only counsel the individual. But you run the risk when you identify the person of making that individual a possible victim. If it becomes known that he is virus-infected, he could become a victim of attack or assault. These are the dilemmas we are trying to anticipate and prevent. ■

SOURCE, from page 7

Corpus and the Doctrine of Original Intent." 1986 *Detroit College of Law Rev.* 983.

Lively, Pierce. "A View from Below." 1986 *Detroit College of Law Rev.* 975.

McGillis, Daniel. *Community Dispute Resolution Programs and Public Policy.* National Institute of Justice, 1986.

Mikva, Abner J. "Congress: The Purse, the Purpose, and the Power." 21 *Georgia L. Rev.* 1 (1986).

Rains, Robert E. "A Specialized Court for Social Security? A Critique of Recent Proposals." 15 *Florida State University L. Rev.* 1 (1987).

✔Powell, Lewis F., Jr. "Remarks to the General Practice Session, ABA." San Francisco, Aug. 8, 1987.

✔Powell, Lewis F., Jr. "Remarks to the Judicial Administration Division, ABA." San Francisco, Aug. 10, 1987.

Steiner, Henry J. *Moral Argument and Social Vision in the Courts.* Wisconsin Press, 1987.

Wald, Patricia M. "Changing Course: The Use of Precedent in the District of Columbia Circuit." 34 *Cleveland State L. Rev.* 477 (1985–86).

✔Walsh, Lawrence E. "Truth and the Rule of Law" (Remarks at the ABA Prayer Breakfast), Aug. 9, 1987.

Webster, William H. "Sophisticated Surveillance—Intolerable Intrusion or Prudent Protection?" 1986 *Detroit College of Law Rev.* 1179.

✔White, Byron R. "Remarks Before ABA Litigation Section." San Francisco, Aug. 10, 1987.

Wright, J. Skelly. "The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges." 14 *Hastings Constitutional L.Q.* 487 (1987).

CALENDAR

Sept. 8–11 Seminar for New Appellate Judges

Sept. 14–18 Orientation for New Probation & Pretrial Services Officers

Sept. 15–16 Staff Safety Program

Sept. 16–18 Third Circuit Judicial Conference

Sept. 16–18 Bankruptcy Case Management

Sept. 21–22 Judicial Conference of the U.S.

Sept. 28–30 Workshop for Judges of the Seventh Circuit

Oct. 4–6 Claims Court Conference

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 19
NUMBER 10
OCTOBER 1987

Assistant Attorney General Willard Discusses Settlement, Tort Reform, Administration Policies

Richard K. Willard is a graduate of mory University and Harvard Law chool. He was in private practice in Texas efore coming to the Justice Department in 981 as counsel for intelligence policy. fter one year's service as deputy assistant torney general, he was appointed assist- nt attorney general in charge of the Civil ivision in 1983.

Richard K. Willard

You attended the conference on al- rnative dispute resolution spon- ored by the Administrative Con- rence of the U.S. How enthusiastic e you about negotiated rulemaking nd other innovations for achieving ttlements?

We have been very open to innova- ons along these lines and have tried be cooperative. A lot of people on't realize that there is already a ood bit of alternative dispute resolu- on in some areas of our litigation. For ample, there is an elaborate admin- rative process under the Federal rt Claims Act in which many claims are resolved before litigation ever results. We have also promulgated guidelines for the use of minitrials in some of our commercial disputes, and we certainly are interested in trying other approaches to the problem.

Sometimes people will raise questions as to why we do not settle more

See WILLARD, page 6

ongress Returns to Agenda That Includes mnibus Court Reform, Possible RICO Changes

The following legislative items of terest to the judiciary were intro- iced before Congress recessed in ugust:

- Rep. Robert W. Kastenmeier (D- s.) introduced H.R. 3152, the Om- ous Court Reform Act of 1987. Cer- n features of the bill are parallel to me sections of the Judicial Branch provements Act of 1987, S. 1482 e *The Third Branch*, August 1987, at The bill would, in part abolish the mandatory appellate ju- diction of the Supreme Court; ncrease the jurisdictional amount federal diversity jurisdiction pur- ses from $10,000 to $50,000, allow tain multi-state/multi-party cases be heard in federal courts, and odify the definition of citizenship for diversity cases for corporations;

reduce civil filing fees from $120 to $90, and impose the fee on the U.S. government; the Judicial Conference would be authorized to set fees every five years, provided that increases are no more than one-third of then-existing rates;

eliminate the requirement for mandatory annual circuit judicial conferences; and

authorize pilot court-annexed arbitration programs for five years.

- Sen. Howell T. Heflin (D-Ala.) introduced S. 1630, a bill to provide for enhanced retirement and survivor's annuities for bankruptcy judges and magistrates and for other purposes. The bill is similar to H.R. 2586, which

See LEGISLATION, page 10

ABA Acts on Judicial Screening Committee, Grand Jury Principle

A number of issues were discussed at the American Bar Association annual meeting that are of interest to the federal judiciary.

The Standing Committee on the Federal Judiciary, the group that investigates and rates candidates for Article III judgeships, has been increased from 14 to 15 members to include a representative from the Federal Circuit. Traditionally this committee has had one member for each of the circuits (plus a second member for the Ninth Circuit and one at large) but until now there has been no member for the Federal Circuit. In making the request the committee cited increased workloads.

A resolution of the Section on Patent, Trademark, and Copyright Law was approved asking that nominees for appointment to the U.S. Court of Appeals for the Federal Circuit "reflect consideration of the Court's exclusive appellate jurisdiction over all patent cases; the number, size, and complexity of the patent cases before the Court, and the time spent by the Court's judges on patent cases."

The ABA House of Delegates also:

- Adopted a principle related to alleged grand jury abuse. For many years the ABA has taken stands on

See ABA, page 9

Inside . . .

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Judicial Fellows Selected for 1987–88 . . . p. 3

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Fifth Circuit Holds En Banc That Magistrates Cannot Preside Over Felony Jury Selection

A magistrate may not preside over the selection of the jury in felony cases under 28 U.S.C. § 636(b)(3), the Fifth Circuit has held. *U.S. v. Ford*, No. 86-1098 (5th Cir. Aug. 11, 1987) (en banc). The local rules of the Northern District of Texas provide that a magistrate can preside over jury selection "with consent of the parties and the District Judge," but make no explicit provision for review of any of the magistrate's rulings during voir dire. Neither the government nor defense counsel expressly consented or objected to the magistrate's presiding over jury selection. On appeal, the defendant argued as one of her grounds that the district court erred in directing the magistrate to preside over jury selection. A panel of the Fifth Circuit affirmed the conviction, finding that Congress, in granting to district judges the power to give magistrates additional duties, had included the power to direct magistrates to preside over jury selection in felony cases. *U.S. v. Ford*, 797 F. 2d 1329 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 964 (1987).

The court sitting en banc did not find that Congress intended such a grant of power to district judges. The court also rejected the reasoning of the three-judge panel, and held that jury selection is an essential component of the felony trial, which itself may not be delegated to a magistrate. Even were jury selection to be viewed as a pretrial matter, the court stated that the difficulties of review by an article III judge of a magistrate's rulings in jury selection—and the absence of a statutory procedure for that review—left it unconvinced that Congress intended to allow delegation of felony jury selection. Since the magistrate had conducted the voir dire without objection and the trial was fundamentally fair, however, the court stated that the error was harmless.

The First, Second, and Ninth Circuits have permitted a magistrate to

See MAGISTRATES, page 4

Nominations for Devitt Distinguished Service to Justice Award Being Accepted

Nominations for the annual Edward J. Devitt Award for Distinguished Service to Justice are being accepted until Dec. 31, 1987. This year's selection committee consists of Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Devitt. West Publishing Co. confers the award each year to an Article III federal judge in recognition of accomplishments and professional activities that have contributed to the cause of justice. The award is named for Edward J. Devitt, senior judge of the U.S. District Court for the District of Minnesota, who was chief judge of that court for more than 20 years. Previous recipients of the award include Judge Albert B. Maris (3d Cir.), Judge Walter E. Hoffman (E.D. Va.), Judge Frank M. Johnson, Jr. (11th Cir.), Judge William J. Campbell (N.D. Ill.), and Judge Edward T. Gignoux (D. Me.). Chief Justice Burger received a special award in 1983, and the late Judge Edward A. Tamm was honored with a special posthumous award in 1985.

Nominations for the 1987 award should be submitted to Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164-0526.

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

200 Years Ago...

October 1787: Submitting the Constitution to state ratification conventions triggered a torrent of pamphleteering to influence the elections of delegates and their deliberations. The authors used pseudonyms with indigenous references ("Federal Farmer," "Old Whig") or names from antiquity ("Aggripa," "Brutus").

The best known of these efforts first appeared in the New York press on Oct. 27, addressed "to the people of the state of New York," a reference to the universal (manhood) suffrage for electing delegates to the New York's 1788 ratification convention. Its authors wrote under the name "Publius"—probably a reference to Publius Valerius Publicola, about whom Plutarch wrote—and were in fact Alexander Hamilton and James Madison, with John Jay as a minor contributor.

Publius's essays were published in book form as *The Federalist* in March 1788, even before all of its 85 essays appeared serially in the press.

Although the essays clearly had an immediate, partisan goal, *The Federalist* has a cohesive form and theory. On one level, it explicates the thinking of the Constitution's authors and is "entitled to great respect in expounding the Constitution," said Chief Justice Marshall in *McCulloch*. The Supreme Court has cited it over 206 times. On a deeper level, Publius was a spokesman for what he called a new "science of politics," and *The Federalist* is by now regarded as a classic of modern political theory.

BICENTENNIAL OF THE U.S. CONSTITUTION

Dominick, Pearson, and Sloan Selected as Judicial Fellows for Program's 1987–88 Year

Mary F. Dominick, Albert M. Pearson, and Judy B. Sloan have been selected as the Judicial Fellows for 1987–88.

Ms. Dominick received her B.A. and J.D. degrees from Vanderbilt University and an LL.M. from the Parker School of Foreign and Comparative Law at Columbia University. She has most recently been a lecturer and research associate at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany. Her duties there included reporting on current legal developments in the United States, writing for the *Encyclopedia on Public International Law,* and teaching a course on American private law at the University of Heidelberg. Ms. Dominick also has worked in the Netherlands, Switzerland, Belgium, France, and the United States, concentrating on the institutional aspects of legal and political systems. She will be assigned to the AO.

Mary Dominick

Albert Pearson

Professor Pearson is a professor of law at the University of Georgia, where he has taught since 1974. He received his B.A. from Birmingham-Southern College and his J.D. from Vanderbilt. Professor Pearson clerked for Judge Walter P. Gewin (5th Cir.) and then taught at Boston College Law School. He has worked as reporter in drafting projects for the ABA and the National Conference of Commissioners on Uniform State Laws, and as codirector of the annual trial advocacy program of the Georgia Institute of Trial Advocacy. Professor Pearson has also done trial and appellate litigation and was an issues adviser to a candidate for the U.S. Senate. He will be as-

Judy Sloan

See FELLOWS, page 10

Applications Sought for 1988–89 Fellowships

The Judicial Fellows Commission invites applications for the 1988–89 Judicial Fellows Program from persons interested in judicial administration. The program, established 15 years ago, is patterned after the White House and Congressional Fellowships.

Fellows will be chosen by the commission to spend a year, beginning in September 1988, in Washington, D.C., at the Supreme Court, the Federal Judicial Center, or the Administrative Office of the U.S. Courts.

Candidates should be familiar with the judicial system, have at least one postgraduate degree, and two or more years of professional experience. Stipends for the fellowship are based on salary history and comparable government salaries.

Information about the Judicial Fellows Program and on application procedures is available upon request from Vanessa M. Yarnall, Associate Director, Judicial Fellows Program, Supreme Court of the United States, Rm. 5, Washington, DC 20543, tel. (202) 479-3374. Application materials should be submitted by Nov. 30, 1987.

PERSONNEL

Nomination

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Sept. 10

Paul V. Niemeyer, U.S. District Judge, D. Md., Sept. 11

Frank S. Van Antwerpen, U.S. District Judge, E.D. Pa., Sept. 11

Confirmation

David B. Sentelle, U.S. Circuit Judge, D.C. Cir., Sept. 9

Appointments

Morton I. Greenberg, U.S. Circuit Judge, 3d Cir., June 18

H. Robert Mayer, U.S. Circuit Judge, Fed. Cir., June 19

Layn R. Phillips, U.S. District Judge, W.D. Okla., June 22

James H. Alesia, U.S. District Judge, N.D. Ill., July 1

Elevation

Barbara J. Rothstein, Chief Judge, W.D. Wash., Oct. 1

Senior Status

Walter T. McGovern, U.S. District Judge, W.D. Wash., Oct. 1

Deaths

Robert L. Taylor, U.S. District Judge, E.D. Tenn., July 11

Bryan Simpson, U.S. Circuit Judge, 11th Cir., Aug. 22

CALENDAR

Oct. 4–6 U.S. Claims Court Judicial Conference

Oct. 7–10 Metropolitan District Chief Judges Conference

Oct. 12–14 Workshop for Judges of the Sixth Circuit

Oct. 13–15 First Circuit Judicial Conference

Oct. 15–17 Second Circuit Judicial Conference

Oct. 21–23 National Conference of Bankruptcy Judges

Oct. 25–28 Workshop for Judges of the Eleventh Circuit

Nov. 11–13 Workshop for Judges of the Fifth Circuit

Investigation of Judge Hastings by House Subcommittee on Criminal Justice Continues

Judge Alcee L. Hastings (S.D. Fla.) has sent a letter to Rep. John Conyers, Jr. (D-Mich.), chairman of the House Judiciary Committee's Subcommittee on Criminal Justice, protesting efforts by the subcommittee to obtain grand jury records related to the subcommittee's investigation of him.

Judge Hastings was acquitted of criminal charges in 1983. The Eleventh Circuit Court of Appeals later conducted its own investigation pursuant to 28 U.S.C. § 372(c). The Judicial Council of the Eleventh Circuit certified to the Judicial Conference that Judge Hastings "has engaged in conduct which might constitute grounds for impeachment," and the Judicial Conference then certified to the Speaker of the House that "consideration of impeachment may be warranted" in the matter (see *The Third Branch*, April 1987, p. 5).

Judge Hastings was invited to submit a written response to the Eleventh Circuit's report, which he did through counsel. Judge Hastings's counsel has been given access to the report, but the report has not been made public, a fact Judge Hastings has protested. ■

NOTEWORTHY

Statistics on federal offenders published. The Administrative Office of the U.S. Courts has published *Federal Offenders in the United States Courts 1985*, a presentation and analysis of data for defendants convicted in the U.S. district courts during the 12-month period ended June 30, 1985. During this period, approximately 65 percent of the 53,060 defendants in the U.S. district courts were charged with offenses under the Drug Abuse Prevention and Control Act, fraud, traffic violations under the Assimilative Crime Statute, larceny, or theft. The number of defendants in the district courts charged with immigration offenses decreased to only 5 percent of all defendants, compared with 6 percent in 1984. Nearly three-fourths of the filings for immigration offenses were in the Southern and Western Districts of Texas; the Southern Districts of California and Florida accounted for 18 percent.

Of the 46,584 defendants with cases closed, 18 percent were not convicted. Eighty-four percent of the cases without convictions were dismissals, while 16 percent were acquittals.

The percentage of sentenced defendants given terms of imprisonment decreased to 39 percent.

Probation officer entitled to judicial immunity. A probation officer is entitled to absolute immunity from a civil suit for damages, the Second Circuit has held. *Dorman v. Higgins*, 821 F.2d 133 (2d Cir. 1987). Plaintiff Dorman sought damages and injunctive relief against a U.S. probation officer for the preparation of an allegedly false presentence report on Dorman. Dorman alleged that false statements appeared in the report as the result of a conspiracy between the probation officer and the prosecuting attorney and due to the probation officer's failure to make an adequate investigation of the relevant facts. Dorman alleged that his sentence of five years' imprisonment and a $1,000 fine for mail fraud was caused by these allegedly false statements, and requested money damages and an injunction against any further use of the report. Chief Judge Constance Baker Motley (S.D.N.Y.) dismissed the complaint, ruling that a probation officer preparing presentence reports is performing a quasi-judicial function and is entitled to absolute immunity from suit for damages for their improper preparation. On appeal, the Second Circuit affirmed, holding that the probation officer had absolute immunity from the entire claim for damages. "[G]iven the propensity of prisoners to file lawsuits . . . , we perceive a need for the probation officer to have absolute immunity from a civil suit for damages," the Second Circuit held, seeing "little danger" in according such immunity, particularly given that the report is "subject to adversary scrutiny and at least two layers of judicial review." 821 F.2d at 138.

See NOTEWORTHY, page 5

Federal Probation Celebrates Fifty Years

Federal Probation, the journal published by the Probation Division of the AO, marks 50 years in print this year. The quarterly began as a mimeographed newsletter geared towards persons working in the federal probation system but quickly expanded to satisfy "the divergent interest and needs [of] a class of readers engaged in various federal, state and local preventive and corrective activities in the field of delinquency and crime." The journal became an outlet for research findings and opinions, as well as a source of information on innovations of interest to criminal justice and corrections professionals. Currently, *Federal Probation* is sent without charge to interested U.S. probation officers, federal judges, and Bureau of Prisons, Parole Commission, and other federal government employees. Others may subscribe to it (at an annual rate of $5) through GPO.

In celebration of *Federal Probation*'s golden anniversary, the June 1987 issue reprinted some of the most outstanding articles, book reviews, and news items from past issues. The editors also recently issued a five-year cumulative index for 1982–86, which includes alphabetical listings of articles and authors and a subject index. To obtain a copy of the index, or to inquire about subscriptions, write to Editor, *Federal Probation*, Administrative Office of the U.S. Courts, Washington, DC 20544.

MAGISTRATES, from page 2

preside over voir dire in felony cases The Ninth Circuit cases have expressly held that delegation of jury selection to a magistrate is constitutional The First and Second Circuits have held that magistrates may preside over such jury selection if the defendant fails to make a contemporaneous objection to the practice. ■

Chief Judge Paul H. Roney (11th Cir.), Chief Judge Pierce Lively (6th Cir.), and Judge Richard S. Arnold (8th Cir.) at the recent FJC seminar for newly appointed appellate judges.

At the seminar, Prof. Ronald M. Levin (Washington Univ. School of Law) talks with Judge John C. Godbold, FJC Director. (Background, Judge Frank X. Altamari (2d Cir.) talks with Columbia Univ. Law School Prof. Maurice Rosenberg.)

NOTEWORTHY, from page 4

As to the claim for injunctive relief, the Second Circuit noted that under *Pulliam v. Allen*, 466 U.S. 522 (1984), an official's entitlement to absolute immunity for damages does not bar the granting of injunctive relief, but the court affirmed the district court's dismissal of Dorman's claim for injunctive relief, noting that such users of probation reports as the Parole Commission and the Bureau of Prisons were not named as defendants, and that the allegations of imminent danger of harm were insufficient in any case.

Update on caseload in S.D. Fla. In 1982, the caseload of the U.S. District Court for the Southern District of Florida required the court to ask for assistance from 48 visiting judges, but in 1986, the district was able to eliminate its visiting judge program, and is now able to perform its work without this "formerly needed and much appreciated assistance," Chief Judge James Lawrence King reported to the Eleventh Circuit Conference earlier this year.

Chief Judge King's report for 1986, based upon data from the AO's Statistical Analysis and Reports Division, showed that during the calendar year 1986 the Southern District of Florida was confronted with the heaviest criminal caseload of any district court in the country. The district's judges conducted more criminal trials, put in more criminal hours in court, tried more felony criminal cases, and tried more felony criminal defendants than any court in America. In that year the district also had more felony defendants under probation supervision than any court in America.

Despite the fact that criminal case filings increased by 13.45 percent from 1985 to 1986, the district's disposition rate increased by 35 percent, with 1,426 cases terminated in 1986 compared with 1,089 terminated in 1985.

During 1986, the Southern District of Florida averaged 53.2 jury trials per judge, and had nearly 40,000 jurors reporting for service. ■

Positions Available

Circuit Executive, 3d Cir. Salary to $72,500. Works under direction of judicial council pursuant to 28 U.S.C. § 332(e) and other statutes and rules. Must have bachelor's degree in management or related field, experience in administration or equivalent. Legal training preferred but not required. Certification pursuant to 28 U.S.C. § 322(f) prerequisite to appointment, but applications from qualified noncertified applicants encouraged. Send resume by Oct. 15, 1987, to William K. Slate II, 21613 U.S. Courthouse, 601 Market St., Philadelphia, PA 19106.

Chief Deputy Clerk, 1st Cir. Salary to $53,830. Must be a member of the bar and have a minimum of 6 years' progressively responsible administrative experience in public service or business. Applications with resumes due by Nov. 2, 1987, in Clerk's Office, U.S. Court of Appeals, 1606 John W. McCormack Post Office & Courthouse, Boston, MA 02109.

Clerk, D.C. Cir. Open until filled. Send resume to Mark Langer, Chief Staff Counsel for the D.C. Circuit, 3429 U.S. Courthouse, Washington, DC 20001.

Clerk, U.S. Bankruptcy Court, M.D. Tenn. Salary to $69,976. Requires minimum of 10 years' progressively responsible administrative experience in public service or business, at least 3 years in a position of substantial management responsibility. College and law school education can be partially substituted for experience. Submit resume or application to Hon. Keith M. Lundin, Judge, U.S. Bankruptcy Court, 701 Broadway, 223 Customs House, Nashville, TN 37203.

Chief Pretrial Services Officer, M.D. Fla. Salary $38,727–69,976. Statutory position, responsible for pretrial services and pretrial diversion in district (see 18 U.S.C. § 3152). Requires college degree, 3 years' experience in personnel work with at least 1 year at level of probation officer or equivalent in correctional setting. Send resume by Nov. 13, 1987, to Donald M. Cinnamond, Clerk, U.S. Dist. Ct., Attn.: Chief Pretrial Services Officer, P.O. Box 53558, Jacksonville, FL 32201.

EQUAL OPPORTUNITY EMPLOYERS

WILLARD, from page 1
of our cases. In fact, we do settle many cases. But the Civil Division wins close to 90 percent of the cases that we litigate. That suggests to me that we are probably not missing a lot of good settlement opportunities, and that some of the criticism of the government for not being willing enough to settle comes from parties whose legal position is not very strong in the first place. Generally speaking, we do not burden the courts by litigating cases in which we are unlikely to prevail.

What has been the department's experience as a participant in court-annexed arbitration?

Our experience has been that this approach can be very helpful in cases involving very specific kinds of factual inquiries. Such fact-intensive cases will often arise under the Federal Tort Claims Act, the Longshoremens Act, or the Miller Act. On the other hand, this kind of procedure will not be very helpful if you have a claim for equitable relief or where legal issues predominate. No one would suggest, for example, that court-annexed arbitration should be employed if someone is suing to have a statute declared unconstitutional. So as long as programs like this recognize that some kinds of government litigation really are not suitable for arbitration, we are very happy to cooperate.

You chaired the administration's Tort Policy Working Group. Where do its proposals stand today?

This has been a major priority, and I believe that it has paid off. Since we issued our original report in February 1986, over two-thirds of the states have adopted one or more of our recommended changes in their tort law. Very rarely do you get this many states adopting a particular kind of legislation in such a short time span, especially legislation making such far-reaching changes in a major area of the law. This has been a phenomenally successful legal reform movement.

Will the Tort Policy Working Group be issuing additional reports?

The group is ongoing, and I suspect that as the need arises we will make other reports. I should point out that our group does not do empirical research or that kind of thing. We help develop the administration's position on these issues, but we are not a think tank. We draw heavily on the work of scholars and think tanks such as the Rand Corporation.

"[O]ver two-thirds of the states have adopted one or more of our recommended changes in their tort law."

Are you pleased that so many of the tort reform initiatives have been at the state level rather than the federal?

Yes, this has been a key part of our strategy. We opposed efforts to federalize tort law across the board, believing that it should remain primarily a state responsibility. We did support federal tort reform legislation in limited areas where we thought it was appropriate, such as products that are sold nationwide, or in defining the liability of the federal government itself or its contractors. But beyond those limited areas, we always felt that tort reform is a job for the states. And, to the extent tort reform at the state level succeeds, it lessens the need for federal legislation.

"We opposed efforts to federalize tort law across the board, believing that it should remain primarily a state responsibility."

What is your position on the compensation program of the National Childhood Vaccine Injury Act?

The administration is strongly opposed to this title, and it was very reluctantly approved by the President last year only because it was attached to legislation that contained a number of other very desirable provisions. Since he does not have a line item veto, he had to either accept it all or reject it all. He decided to accept it, partly because the vaccine title does not go into effect unless and until funding legislation is passed. We tried to make it very clear that substantial changes in this legislation are necessary before the administration could agree to any funding proposal. We have been particularly outspoken about the fact that the existing legislation would saddle the courts, for the first time, with the responsibility for administering a welfare entitlement program rather than simply conducting judicial review of an executive agency's decisions.

Now a lot of people say, "Oh well, this will be a very small program." But we have learned from our experience with the black lung program and others that confident predictions that entitlement programs will remain small frequently turn out to be wrong. Of course, the number of children who are actually injured by vaccines is believed to be quite small. However, given the large number of children who receive vaccines each year and who later are found to suffer from various kinds of mental and neurological problems, I think that potentially we could see tens of thousands of claims a year being filed under this program.

What is your position on drug testing?

I have been heavily involved in the administration's policy in this area. I participated in drafting Executive Order 12,564, which mandates drug testing for government employees in sensitive positions. In the Civil Division we have been handling litigation all over the country about this issue. So far we have won all of the cases at

the court of appeals level. The result at the district court level has been more mixed, although lately we have won several significant cases. I think this is one of the leading federal constitutional issues that is currently being litigated.

Is there a trend in who files such cases?

Most of the litigation seems to be brought by government employee unions, although some cases are brought by individuals.

What is your view on the various proposed RICO changes?

We believe that the civil RICO remedy has turned into something far different from what was originally envisioned. It is rarely used as a way of attacking organized crime, and instead seems to have turned itself into an all-purpose federal fraud statute, which is used primarily to seek treble damages in business and commercial disputes. The result has been a mushrooming number of cases including civil RICO allegations. For example, there is one case currently being litigated in which former President Marcos of the Philippines has been sued on a civil RICO theory, the allegation being that under his presidency the government of the Philippines was a racketeer-influenced corrupt organization. This illustrates how strange some of the theories are. We do not think that this is what Congress intended, and the administration favors legislation that would greatly restrict the ability of private parties to bring civil RICO actions.

You supervise about 130 tort lawyers who defend the federal government in tort litigation. You have approved or recommended to the deputy attorney general that about one-half billion dollars of taxpayer money be spent on settling tort cases. Do you have a position on the proposals that have been made for amending rule 68 of the Federal Rules of Civil Procedure, with the goal of putting more "teeth" into it?

We certainly support the goal of trying to create incentives for people to avoid frivolous litigation and to settle cases that ought to be settled. However, I do not believe we should discard the basic American rule on attorneys' fees without a great deal of thought and study. We should be careful that any change in rule 68 is not designed in a way that will result in virtually automatic fee shifting. In addition, the department's position is that a sweeping change in rule 68 should be considered through legislation rather than as a rules amendment.

Richard K. Willard

Some tort reform efforts appear to be couched in terms of issues about the role of juries and their discretion. What is your view of this aspect of tort reform?

My view is that the proper role of the jury is to decide the facts, not to make public policy. If the standard of tort liability is so broad that it allows each jury to decide without real legal constraint when liability should be imposed, then the jury moves out of the fact-finding realm and into the policymaking realm. Such policymaking is more appropriately the job of elected representatives. I think juries are very good for finding facts, and I am very comfortable assigning them that role. But I do not think juries are well suited to decide questions of economic and regulatory policy in the guise of tort litigation.

The United States brought a civil suit in France against a terrorist who was implicated in a 1982 shooting, and the U.S. won a symbolic monetary award.

Do you coordinate the filing of civil suits against foreign nationals or in foreign jurisdictions with the State Department legal adviser or any other officials?

We have an Office of Foreign Litigation in the Civil Division, which is responsible for litigation in foreign courts. It is basically a coordination office, since the actual conduct of litigation is assigned to attorneys in the foreign countries involved. Currently the office is handling about 800 cases in 50 countries. We customarily retain foreign counsel, since our lawyers are not licensed to practice in foreign countries. In most major countries, we have established relationships with attorneys that represent the U.S. We do work closely with the State Department on matters of foreign litigation to make sure that foreign policy considerations are fully reflected in our position. This was our approach, for example, in this French terrorist case. We retained a French advocate to represent the United States as a civil party in that criminal proceeding, which is a form of participation that is available under the laws of France. Civil Division attorneys, working with the State Department, assisted the advocate in obtaining a successful resolution of the case.

What has the Civil Division done about litigation over Social Security disability benefit claims?

We had a crisis in Social Security disability litigation several years ago, brought about by a number of factors. In 1980, Congress passed legislation requiring the Social Security Admin-

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istration to review disability cases to see whether benefits should continue. As a result of that review process, a lot of people were taken off the disability rolls, and they then sought review of that action. This produced a heavy wave of litigation and a lot of tension between SSA, the Justice Department, and the courts. By 1984, for example, our success rate in Social Security cases had dropped to an all-time low, with the government being affirmed by the court only about 38 percent of the time (not counting the cases that were remanded).

We did several things to try to turn that situation around, and I think it is a lot better now. One, we worked with Congress to pass the 1984 reform legislation providing clear guidance to the courts and to SSA on how to handle some of these issues that had been creating problems. Second, we changed the so-called nonacquiescence policy in 1985, so that SSA now complies with circuit precedent rather than ignoring it. Third, we took administrative steps to improve the handling of the cases in terms of filing answers and transcripts of the administrative proceeding. I understand that now an answer and transcript are filed within 60 days in about 83 percent of those cases. This is a great improvement on the timeliness of those filings. Finally, we have instituted with HHS a supplementary review process, so that after lawsuits are filed we take a careful look at the cases. If we think the decision may not comply with applicable legal requirements, then we will voluntarily seek a remand before the court's time and effort are wasted on a case that may not be defensible. Over 1,900 cases have been taken back voluntarily under that program.

All of these efforts have been aimed at improving the credibility of the government in litigating these cases, and I think those efforts have been paying off. In 1986 our affirmance rate, exclusive of remands, was up to 62 percent. It still is not as high as I would like to see it, but I think that as a result of these and other efforts, we will be presenting stronger cases.

Do you favor a special court to handle Social Security cases?

We have looked at the possibility of creating a specialized Article I tribunal for Social Security cases. We support the general idea, and I have been working with members of Congress and others to develop interest in it. I think that it is going to require a long-term effort to achieve such a court, and we will have to deal with the political sensitivities of the Social Security program. We will need to assure people that this is not an effort to downgrade the protection given to Social Security claimants and that a specialized court of this nature can be a high quality court that provides fair treatment. If we can meet these concerns, then there is a chance that this kind of specialized court would be set up.

"[W]e have a choice to make . . . . Either [our Article III judiciary] will become a vast bureaucracy like many European countries have, or we will have to cut back sharply on the kinds of cases that come into the system."

In a *Third Branch* interview last year, Chief Judge Lively commented on the large number of Social Security cases in the Sixth Circuit.

I understand his concern. However, the Article III judiciary sits at the top of a very broad pyramid. About two million claims a year are filed for Social Security disability benefits and only about 25,000 lawsuits are filed by people who are denied benefits and seek judicial review. So the courts may think it is a tidal wave of cases, but if you consider the two million cases that originally come in, 25,000 is not a high percentage. Also, these 25,000 cases are not a representative sample. The government never seeks review in cases where benefits are granted. And even of the cases where benefits are denied, presumably those claimants who have stronger cases are more likely to seek judicial review.

Have you taken a stand on the proposal for an intermediate national court of appeals? Chief Justice Burger had proposed that the incumbent members of the courts of appeals should serve on such a panel; Chief Justice Rehnquist suggests a new national court of appeals constituted by Article III judges specifically appointed to this court.

I think that we have a choice to make about the nature of our Article III judiciary. Either it will become a vast bureaucracy like many European countries have, or we will have to cut back sharply on the kinds of cases that come into the system. My preference would be to restrict the caseload, so that the federal judiciary can retain its distinctive character as an elite branch of the government which handles the kinds of cases that are significant enough to require the attention of an Article III court. Routine and repetitive litigation should be placed either in state courts or in specialized federal courts.

Unfortunately, Congress is going the opposite direction, as in the childhood vaccine program. Congress seems intent upon putting more and more kinds of routine entitlement cases into the federal courts. We have proposals, for example, to provide for judicial review of Veterans Administration benefit determinations which would certainly increase the caseload. We cannot have it both ways. We cannot constantly expand the caseload of the federal courts and at the same time expect the judiciary to remain a small, high-quality, non-bureaucratic institution.

Would you favor elimination of diversity jurisdiction cases in the federal courts?

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I would certainly favor legislation, nd I think it would not be very con-roversial, to eliminate federal juris-iction for automobile accident cases, egardless of the amount of controver-y. These days, simply raising the mount of controversy would not liminate many cases, since it is not ard to allege $100,000 or more in ain and suffering even in a routine rt case. I would also favor eliminat-ıg diversity jurisdiction in cases here you have an in-state plaintiff. It hard to see why an in-state plaintiff ıould be entitled to select a federal rum, since such a plaintiff is pre-umably not likely to be the subject of rejudice in his own local state court. hose two steps alone would elimi-ate perhaps half of the diversity ses. Other measures may be justi-ed as well, but I think the time has me to find ways to reduce the umber of diversity cases without eating the issue as an all-or-nothing roposition.

Do you have any special ideas or ıy message for the federal judges?

Well, I have a couple of ideas. One is at district judges should be more receptive to motions to dismiss or motions for summary judgment, and that appellate courts should be more willing to affirm those decisions. A lot of litigation really is not meritorious, and yet it drags on. It consumes time and resources of the parties and the courts. I think that parties need to be more aggressive in filing dispositive motions when warranted. I think that some judges will not face up to a tough legal question in the hopes that the case will go away or get settled. This is not true of all judges, by any means, but there are some judges who are very reluctant to dismiss cases without allowing discovery, without letting the case "percolate" around for a while. Similarly, I think a lot of appellate courts are too willing to be "Monday morning quarterbacks" and reverse a summary judgment by finding a lurking fact issue. And after that happens a few times, a trial judge becomes understandably gun-shy. And yet if judges would be more forthright—and appellate courts more understanding—in dismissing cases on legal grounds, that would help get rid of litigation that is not going to be successful and discourage the filing of unmeritorious lawsuits.

"We cannot constantly expand the caseload of the federal courts and at the same time expect the judiciary to remain a small, high-quality, non-bureaucratic institution."

Here in Washington we also see a lot of what I call political lawsuits—lawsuits that have no real prospect of success but which are a good way to generate publicity. Usually there is a big headline when the suit is filed, and maybe bare mention on the back page when the case is ultimately dismissed. I think courts should be more vigilant in not allowing themselves to be used as a vehicle for such political theater. We intend to seek more aggressive use of rule 11 in situations where people file cases for their impact in Congress or in the media rather than because there is any realistic prospect of prevailing. ■

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rand jury procedures, state and deral, and the ABA's Section of riminal Justice has drafted a Model rand Jury Act and over 30 Grand ıry Principles. The principle dopted this year, No. 32, relates to retrial disclosure to indicted defend-ıts of "all relevant matters occurring efore the grand jury." The Federal ules of Criminal Procedure and 18 .S.C. § 3500 permit substantial dis-osure, but with certain qualifica-ons. The need for this additional rand jury principle, the ABA con-nds, stems partly from the Supreme ourt's decision in *U.S. v. Mechanik*, 75 U.S. 66 (1986).

- Approved additions to the ABA andards for Criminal Justice on ental health standards entitled Competence and Capital Punishment." Previously the criminal justice standards have not addressed the subject of posttrial mental competence. *Ford v. Wainwright*, 477 U.S. 399 (1986) and other recent capital cases have prompted the ABA to recommend this standard.
- Supported reauthorization of independent counsel provisions of the Ethics in Government Act of 1978, revised to provide for limited judicial review of the Attorney General's decisions not to seek appointment of independent counsels and to clarify that the court has power to expand the scope of an independent counsel's investigation.
- Urged Congress to increase the salaries of U.S. bankruptcy judges and magistrates.
- Urged amendment of Federal Rules of Civil Procedure and state civil procedural rules relating to pleading and discovery of net worth relative to punitive damages.
- Supported a resolution on pending legislation to close loopholes in the premerger notification reporting requirements of title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.
- Supported legislation to amend the existing federal statute relating to judicial disqualification. The legislation would make disqualification discretionary when a judge or a member of the judge's family has a financial interest that may be substantially affected by the outcome of a case, but would provide that another, disinterested judge be appointed to determine whether the disqualification is warranted.

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Rep. Kastenmeier introduced in the House in June of this year (see *The Third Branch*, July 1987, at 2).

• Sen. Howard M. Metzenbaum (D-Ohio) introduced S. 1523, to amend the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). The bill would amend the across-the-board award of automatic treble damages under civil RICO and provide different remedies depending on the circumstances of the case: (1) "general purpose" units of government, including federal, state, and municipal entities, as well as plaintiffs suing defendants previously convicted of a RICO violation or of an underlying criminal act, would still be able to recover automatic treble damages; (2) consumers and "special purpose" units of government would be entitled to recover up to two times the amount of their actual damages in most cases; (3) other plaintiffs, including business plaintiffs, would be able to recover actual damages, costs, and attorneys' fees; and (4) in securities litigation, certain special provisions would apply to small investors. The bill would also remove the "racketeer" label and provide for limited retroactivity.

• Rep. Rick Boucher (D-Va.) introduced H.R. 2983, a RICO reform bill identical to S. 1523 except for the provisions relating to small investors and retroactivity. Rep. Boucher's bill is virtually identical to a bill which failed to pass in the 99th Congress as H.R. 5445 (see *The Third Branch*, Oct. 1986, at 7).

• Rep. Peter Rodino, Jr. (D-N.J.) introduced H.R. 3227, to create a Federal Courts Study Commission. ■

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signed to the Supreme Court.

Professor Sloan is an associate professor at the University of Toledo College of Law. She received her B.A. from the University of Chicago and a J.D. from the University of Maryland. She worked as an Asper Fellow to Judge R. Dorsey Watkins (D. Md.). She has taught commercial law, contracts, sales, and secured transactions. She has also studied international law at The Hague, the philosophical and underpinnings of the Constitution, and the Chinese legal system. She has written articles on antitrust enforcement and the confidentiality of psychotherapeutic records. Professor Sloan will be assigned to the FJC's Research Division. ■

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• Urged Congress to repeal provisions of the National Vaccine Injury Compensation Program of 1986 which is seen by some critics as requiring federal courts to render advisory opinions and to perform inappropriate administrative functions. Legislation has been passed establishing the compensation program, but Congress has not yet funded the program.

• Disapproved a resolution that recommended the establishment of the U.S. Court of Military Appeals as an Article III court.

• Withdrew a resolution submitted by the Antitrust Law Section calling for amendment to Fed. R. App. P. 35(a), which relates to en bancs in the federal circuits.

For further information on these or other matters considered at the meeting, call Alice O'Donnell at the FJC (FTS 633-6359).

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House of Representatives Votes Not to Delay Effective Date of Sentencing Guidelines

The House of Representatives voted 231 to 183 on Oct. 6 not to delay the Nov. 1, 1987, effective date for the guidelines of the U.S. Sentencing Commission. Delay of the implementation date would have required a two-thirds vote.

The House Judiciary Committee had approved by voice vote a measure that would have required a 9-month delay. A bill was also pending in the Senate to delay implementation of the guidelines for 12 months. The Judicial Conference had called for a 12-month delay in the effective date (see story on Judicial Conference, p. 3).

Proponents had stated that delaying the effective date would allow additional time for training judges, probation officers, and attorneys in the use of the guidelines; permit testing of the guidelines for problem areas; and enable the Commission to respond to comments about the guidelines, including those made during hearings before the House Judiciary Committee's Subcommittee on Criminal Justice (see *The Third Branch*, Sept. 1987, at 1). Opponents contended that the courts would be fully prepared to implement the guidelines on Nov. 1 and that no delay was necessary.

The bills in the House and Senate to delay the effective date also would clarify that the guidelines do not apply to offenses committed before the effective date and would create a procedure for expedited judicial consideration of any constitutional challenge to the guidelines. They provide that actions challenging the constitutionality of the guidelines would be commenced in the District Court for the District of Columbia and heard by

See SENTENCING, page 2

Bankruptcy Judge Robert E. Ginsberg Elected to FJC Board

Bankruptcy Judge Robert E. Ginsberg (N.D. Ill.) was elected to the Board of the FJC at the fall meeting of the Judicial Conference, replacing Chief Bankruptcy Judge Martin V. B. Bostetter, Jr. (E. D. Va.), whose term expired.

Robert E. Ginsberg

Judge Ginsberg, a native of Cambridge, Mass., was appointed a U.S. bankruptcy judge on June 7, 1985. He is a graduate of Brown University and American University's Washington College of Law, and he holds an LL.M. degree from Harvard Law School.

Judge Ginsberg was a trial attorney with the U.S. Securities and Exchange Commission, 1969–1972, and was special counsel to the Commission, 1972–1973. From 1974 to 1985, he taught at DePaul University College of Law, in Chicago, in the areas of debtor/creditor relations, corporations, and bankruptcy, and for a part of that time was associate dean. Judge Ginsberg became a full professor at DePaul in 1981. He has also been a lecturer in law at New England School of Law and a visiting professor at the University of Illinois. ■

Vacancies, Automation, Certification of State Law Issues Discussed by Chief Judge Holloway

Chief Judge William J. Holloway, Jr. (10th Cir.), a native of Oklahoma, is a graduate of the University of Oklahoma and Harvard Law School. During World War II, he served in the U.S. Army and attained the rank of first lieutenant. He entered on duty as a circuit judge in 1968 and became chief judge in 1984. Prior to entering the federal court system, Judge Holloway served in the Department of Justice's Civil Division in Washington and spent 16 years in private practice in Oklahoma City.

The Tenth Circuit currently has five vacancies—three in the district courts, two in the court of appeals. Given these constraints on your judge power, is the crunch of cases being felt?

Very much. Probably the most critical situation is in the district court in the District of Colorado, which has seven judgeships authorized and has only five active district judges. So they are waiting hopefully for judges to be appointed. One nomination has been submitted to the Senate, but there are no hearings scheduled. One of the vacancies has existed for over three years, so that is critical. The District of New Mexico is more fortunate. There,

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FJC to Conduct Time Study of Caseload Demands on District Judges and Magistrates

In November the Federal Judicial Center will launch the largest research project it has ever undertaken—a comprehensive study of caseload demands on the time of district court judges and magistrates. The study, which will rely on the cooperation of all district court judges and magistrates, their staff, and personnel from clerks' offices, has been initiated at the request of the Judicial Conference Committee on Court Administration. Findings will be used both for creating up-to-date case weights and for arriving at administrative and policy decisions affecting the courts. The last study of judicial time allocation was conducted eight years ago.

A new approach will be used in this research to avoid drawbacks of previous time studies. In the past, participating judges kept meticulous records of the time spent on every case before them during a three-month period. That approach helped to account for variations in the demands arising from different types of cases, but it imposed substantial record-keeping burdens on the judges and spanned only a portion of the life of most cases. The new study minimizes the burden on individual judges, and it follows cases from filing to termination. Every case filed in a court during a two-week period (different periods for different courts) will be flagged "time-study case" under a monitoring procedure established by the clerk. Judges and magistrates will then be asked to record time expenditures until disposition of the case.

See TIME STUDY, page 4

Siegel Named to Head New AO Office

Karen K. Siegel has been appointed chief of the AO's new Office of the Judicial Conference Secretariat. She will be assisted by Marion Ott, formerly staff assistant to the Director of the AO.

Ms. Siegel's primary duty will be to ensure that the Judicial Conference and all its committees receive proper support from the AO. In that capacity, she will be the AO's staff coordinator to the Conference and will report directly to the Director, who by law serves as secretary to the Conference.

Ms. Siegel has been with the AO for the last five and a half years. She worked in the Office of Legislative Affairs briefly before being named special assistant to Deputy Director James E. Macklin, Jr., in 1982. In 1987, she spent eight months as acting chief of the AO's Office of Audit and Review. Ms. Siegel has provided staff support to the Conference's Committee on Court Administration and its Subcommittee on Judicial Improvements, and has assisted the Director in preparing the report of the biannual Judicial Conference sessions.

Ms. Siegel received her B.A. and J.D. degrees from the University of Miami. She worked for the Justice Department for nearly 10 years, as a trial attorney, attorney-adviser, and deputy legislative counsel in the Office of Legislative Affairs.

LEGISLATION

The following are items under consideration by Congress that are of interest to the judiciary.

• Rep. Gerald D. Kleczka (D-Wis.) proposed an amendment to the Constitution that would permit Congress to authorize bodies in the judicial branch to remove judges for cause. Rep. Kleczka stated that the impeachment process is too time-consuming and causes a delay in the consideration of "vital national issues." The proposed amendment was introduced as a joint resolution, H.R.J. Res. 364, by Rep. Kleczka, Rep. Barney Frank (D-Mass.) and Rep. Bill Frenzel (R-Minn.), and was referred to the House Judiciary Committee.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on H.R. 3152, the Court Reform and Access to Justice Act, introduced by Rep. Robert W. Kastenmeier (D-Wis.) (see *The Third Branch*, Oct. 1987, at 1). The bill includes many provisions that have been recommended by the Judicial Conference. Those recommendations are also contained in S. 1482, the Judicial Branch Improvements Act of 1987 (see *The Third Branch*, Aug. 1987, at 5). Although H.R. 3152 and S. 1482 overlap considerably, they are not identical.

Among H.R. 3152's provisions are abolishment of the Supreme Court's

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a three-judge court in accordance with 28 U.S.C. § 2284. The bills also provide that such cases would be expedited "to the greatest possible extent" and that orders issued in such cases would be reviewable by appeal directly to the Supreme Court.

Pursuant to a provision of the Sentencing Reform Act, the Comptroller General of the United States has transmitted to the House Judiciary and Government Operations Committees a report on the Sentencing Commission's guidelines.

Judicial Conference of U.S. Restructures Committees; Executive Comm.'s Duties Expanded

The Judicial Conference of the United States has approved a plan to reorganize its committee structure and to expand the duties of its Executive Committee. These and other recommendations contained in the report of the Committee to Study the Judicial Conference, which had been appointed by the Chief Justice in December 1986, were adopted at the Conference's meeting in September.

The committee reported its fundamental conclusion that the Conference and its committees are sound but that structural and procedural revisions were necessary to enable the Conference to operate more expeditiously, to enable the committee structure to deal more effectively with matters of budget and resource allocation, and to improve communications among the Conference, Conference committees, the courts, judges, supporting personnel, and the Administrative Office.

The strengthened Executive Committee will provide the Conference with the capability to implement its policies between sessions. The Chief Justice named the following seven judges to the new Executive Committee: Chief Judge Wilfred Feinberg (2d Cir.), chairman; Chief Judge Paul H. Roney (11th Cir.); Chief Judge Levin H. Campbell (1st Cir.); Chief Judge Charles Clark (5th Cir.); Chief Judge Aubrey E. Robinson, Jr. (D.D.C.); Chief Judge John F. Nangle (E.D. Mo.); and Chief Judge Robert F. Peckham (N.D. Cal.).

In reorganizing committee membership, the Conference decided that committee members who have served six or more years would be asked to resign, but may be reappointed. In

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Retirement Provisions for Judges and Other Court System Personnel Explained

Several retirement systems are applicable to employees of the judiciary. The following outlines some of the complicated provisions of the systems.

Article III judges. There are several major differences between retirement from active service with election of senior judge status under 28 U.S.C. § 371(b) and retirement from office under § 371(a). Both actions provide the individual with a lifetime annuity and free the judgeship for nomination by the President. The following are some major distinctions between the two courses of action:

- A senior judge retains a valid commission and may be designated to perform judicial duties. In contrast, a judge who retires under § 371(a) forfeits the legal authority to act as a judge, but gains the freedom to pursue other professional pursuits.
- A senior judge receives all postretirement increases in judicial pay, whereas a judge retiring under § 371(a) does not.
- A senior judge who performs substantial services is entitled to retain office space and supporting personnel whose salaries are paid from government funds. A judge retiring under § 371(a) is not.

Otherwise, both classes of retirees receive similar benefits and annuities. Both may continue to hold federal health insurance and Federal Employees' Group Life Insurance (FEGLI), and participate in open seasons for each of these programs. All retired judges also receive full credit for deposits made to the Judicial Survivors' Annuity Fund during their years of retirement. Although the annuities paid to both types of retirees are subject to federal income tax as well as income taxes in most states, they are not subject to FICA taxes. In addition, the Department of Health

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CALENDAR

Nov. 11 Workshop for Judges of the Fifth Circuit

Nov. 15–21 Seminar for Newly Appointed District Judges

Nov. 18–20 Seminar for Bankruptcy Judges

Nov. 19–20 Judicial Conference Advisory Committee on Criminal Rules

Nov. 19–20 Judicial Conference Advisory Committee on Civil Rules

Trends in Asbestos Litigation Published by FJC

Trends in Asbestos Litigation, by Thomas E. Willging of the Center's Research Division, is an examination of the methods the federal courts have developed for dealing with the burden of asbestos cases. The report describes techniques that have worked and some that have not. Many of the lawyers and judges cited report that asbestos cases are no longer complex but have become routine, yet the problems remain acute because the number of filings has increased so dramatically.

Because of the unique convergence of several factors—the widespread use of a highly toxic product during an extended latency period, the suppression of information about its dangers, the clarity of general causation and the lack of clarity of causation-in-fact, and the numbers and concentrations of cases—there are no direct parallels in superficially similar toxic tort litigation. Because of these same factors, the author predicts that no other toxic tort cases will follow the case-filing pattern of asbestos cases. He also reports the belief of many lawyers in the field that the major wave of asbestos cases is cresting now, and that reduced use of asbestos in the 1970s should lead to fewer filings in the future.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC. Please send a self-addressed mailing label, preferably franked (10 oz.). Do not send an envelope.

NOTEWORTHY

Ninth Circuit holds bankruptcy judges lack statutory authority to issue civil contempt orders. The Ninth Circuit Court of Appeals has held that in giving bankruptcy judges authority over core proceedings, Congress did not also give them contempt power in those proceedings. *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281 (9th Cir. 1987). Since bankruptcy judges do not derive their power from Article III, they have jurisdiction to exercise the contempt power only if they have a statutory basis for that authority. There is no express statutory authority granting the contempt power to bankruptcy judges. In the 1978 Act, Congress impliedly granted the bankruptcy court the power of civil contempt. Congress's general jurisdictional grant to the bankruptcy courts in the 1978 Act was held unconstitutional by the Supreme Court in *Northern Pipeline* in 1982. When Congress amended the Act, it withdrew its grant of contempt power. The United States intervened in *Plastiras* to argue that 28 U.S.C. § 157 and 11 U.S.C. § 105 impliedly confer the contempt power on bankruptcy judges. Section 157 was designed to segregate those "core" proceedings over which a bankruptcy judge could exercise plenary authority from "related" proceedings that could constitutionally be disposed of only by Article III judges. The court rejected the United States's position that the contempt order must be treated as "core" because it is part of the underlying cause. The court held that when Congress repealed the jurisdictional sections with the references to the bankruptcy court's contempt power in response to *Northern Pipeline*, Congress did not impliedly confer the contempt power through other sections. Those sections do not contain any of the limitations on the contempt power that Congress would have spelled out had it intended by those sections to confer the contempt power, the court reasoned.

Ford Foundation funds dispute resolution research program. The Ford Foundation will fund a $3 million research program on dispute resolution. The program, to be called the Fund for Research on Dispute Resolution, will be administered by the National Institute for Dispute Resolution. The fund will invite proposals from researchers and will be governed by a council chaired by Sanford M. Jaffe, the director of the Center for Negotiation and Conflict Resolution at Rutgers University.

Masters in Judicial Studies offered at University of Nevada. For the second year a degree program leading to a masters in judicial studies is offered at the University of Nevada, Reno, in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges. Candidates must be graduates of

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Report of the Director Released by AO

The Administrative Office has released the report of the director, which summarizes the business of the courts and the activities of the AO for the 12-month period ending June 30, 1987.

The report shows that bankruptcy case filings rose more than 17 percent during the 12-month period. There were 473,014 nonbusiness bankruptcy filings and 88,264 business filings.

Criminal case filings over the period rose 4 percent, to 43,292. Prosecutions under the Drug Abuse Prevention and Control Act rose 12 percent, to 8,869, and now account for 21 percent of all criminal case filings and approximately 30 percent of all criminal defendants. As of March 31, 1987, the Drug Aftercare Program was serving 8,889 clients, an increase of 30 percent over the same period in 1986.

Prosecutions of fraud, drunk driving, and other traffic offenses rose significantly. There were 146 homicide cases, 1,215 bank robbery cases, 1,305 income tax prosecutions, and 1,632 criminal immigration cases brought.

The number of civil cases declined 6.2 percent, to 238,982. The decline was concentrated in cases in which the United States was a party. Prisoner petitions increased by 3,551, asbestos-related personal injury and product liability suits by 2,311, and foreclosure cases by 911 over the previous year's figures.

Diversity of citizenship cases increased 5 percent in 1987, to 67,071; they now account for 28 percent of all civil filings.

TIME STUDY, from page 2

On average, every judge will be asked to deal with approximately 20 to 30 time-study cases, though experience indicates that only about half of those cases will result in expenditure of judge time. When completed, the project will have gathered extensive information on nearly 12,000 cases.

In addition to assistance from staff of the district court clerks' offices, the study's success will rely on help from judges' and magistrates' staff. Because time-study cases will constitute only a small proportion of cases active in a court, staff can alert judicial officers when a designated case is before them and assist in recording time expenditures. With the help of five district courts, procedures have been developed and tested to minimize burdens and maintain accurate records. These courts report that the burden on judicial officers is substantially less than that in earlier studies and that the burden on staff is minor.

The main benefit of the study is that it will establish, with increased precision, case weights that take account of variations in the burdens imposed by different features of cases. These case weights are important because they are used in computing, for each district, a weighted filings statistic that figures prominently in the allocation of new judgeships.

The study will also permit investigation of matters affecting the administration of justice. For example, no data on the amount of time that judges spend on cases involving awards of attorneys' fees currently ex ist, yet the matter has recently gene ated great concern. Concerns hav also been expressed about the tim required by summary judgment mo tions, the time spent by judges o discovery issues, and the savings time resulting from case manage ment. Questions about these an other practices can be addressed wit the data collected in the study.

COMMITTEES, from page 3

addition, judges will no longer be required to serve five years before becoming a member of the Conference.

The Conference also adjusted its committee structure. The Chief Justice will make all committee appointments, and he will be assisted in this task by an advisory committee. Additionally, each federal judge will be asked to express his or her interest in serving on a Conference committee. Five Conference committees and their subcommittees will be dissolved, and seven new committees will be created, including a Committee on the Administrative Office, a Committee on Court Security, and a Committee on Space and Facilities. Every five years each committee will recommend either its abolishment or continuance to the Executive Committee.

The Conference also

- Expressed its support for a one-year delay in the effective date of the U.S. Sentencing Commission's sentencing guidelines (see story on House vote on guidelines, p. 1).
- Approved the recommendations of the Committee on Court Administration that the salary ceiling for bankruptcy judges and magistrates be 92 percent of a district judge's salary, and that the salaries of circuit executives and of the deputy directors of the AO and FJC be increased. A draft bill incorporating these recommendations will be sent to Congress.
- Approved revised position descriptions for probation and pretrial services positions.
- Approved revisions to the qualification standard for principal secretaries to federal judges, from "four years as a secretary in a federal court, three of which must be at the JSP-10 level" to "one year of legal secretarial experience at the JSP-10 or equivalent level."
- Approved revisions to the qualification standards for career law clerks.
- Adopted recommendations, as amended, of the Ad Hoc Committee on Court Reporters, including requiring court reporters to keep their financial, attendance, and transcript records on standardized forms.
- Assigned the responsibility for oversight of court automation to the new Committee on Judicial Improvements.
- Determined not to object to the creation of an Article I Claims Court outside the judicial branch.
- Supported enactment, with amendments, of the Court-Annexed Arbitration Act of 1987 (H.R. 2127, 100th Congress).
- Supported enactment, with amendments, of the Federal Courts Study Act (S. 951, H.R. 1929, and H.R. 3227, 100th Congress).
- Recommended that Congress amend 28 U.S.C. § 1292(a)(1), relating to interlocutory appeals.
- Recommended that Congress amend 28 U.S.C. § 1391(c), relating to corporate venue.
- Reaffirmed its March 1987 recommendation that Congress promptly take steps to narrow significantly the civil RICO provisions in 18 U.S.C. § 1964(c).
- Approved a resolution noting with sadness the death of Wade H. McCree, Jr., formerly a judge on the Sixth Circuit Court of Appeals and a member of the first Board of the FJC.
- Made a number of other recommendations pertaining to various personnel, committee, and legislative matters. ■

Health Plan Open Season

An open season to enroll in or change health insurance plans will take place from Nov. 9 to Dec. 11, the AO has announced.

PERSONNEL

Nominations

Dean Whipple, U.S. District Judge, W.D. Mo., Sept. 14

Alfred M. Wolin, U.S. District Judge, D.N.J., Sept. 14

Edward F. Harrington, U.S. District Judge, D. Mass., Sept. 18

Stuart A. Summit, U.S. Circuit Judge, 2d Cir., Sept. 23

Robert S. Gawthrop III, U.S. District Judge, E.D. Pa., Sept. 30

Appointments

Robert F. Kelly, U.S. District Judge, E.D. Pa., July 17

Larry J. McKinney, U.S. District Judge, S.D. Ind., July 22

Philip M. Pro, U.S. District Judge, D. Nev., July 24

Robert H. Bell, U.S. District Judge, W.D. Mich., Aug. 7

Steven A. Felsenthal, U.S. Bankruptcy Judge, N.D. Tex., Aug. 24

William R. Greendyke, U.S. Bankruptcy Judge, S.D. Tex., Sept. 1

Douglas O. Tice, Jr., U.S. Bankruptcy Judge, E.D. Va., Sept. 3

Eugene R. Wedoff, U.S. Bankruptcy Judge, N.D. Ill., Sept. 16

Joyce Bihary, U.S. Bankruptcy Judge, N.D. Ga., Sept. 17

John C. Minahan, Jr., U.S. Bankruptcy Judge, D. Neb., Sept. 17

John C. Cook, U.S. Bankruptcy Judge, E.D. Tenn., Sept. 18

Erwin I. Katz, U.S. Bankruptcy Judge, N.D. Ill., Sept. 25

Wm. Thurmond Bishop, U.S. Bankruptcy Judge, D.S.C., Oct. 9

Elevation

Barbara J. Rothstein, Chief Judge, W.D. Wash., Oct. 1

Senior Status

Irving R. Kaufman, U.S. Circuit Judge, 2d Cir., July 1

John T. Elfvin, U.S. District Judge, W.D.N.Y., July 1

Joseph T. Sneed, U.S. Circuit Judge, 9th Cir., July 21

Joseph H. Young, U.S. District Judge, D. Md., Aug. 1

Walter T. McGovern, U.S. District Judge, W.D. Wash., Oct. 1

Death

John F. Ray, Jr., U.S. Bankruptcy Judge, N.D. Ohio, Oct. 1

Appointment Date Correction

James H. Alesia, U.S. District Judge, N.D. Ill., June 24

HOLLOWAY, from page 1

a replacement for Senior Judge Howard Bratton, a former FJC board member, has been nominated and a hearing has been held.

On the court of appeals, we are waiting. One of our vacancies is over two and a half years old; the other one is six months old. One nomination has been made but no hearings are set. The problem is serious and causes long-range impacts. We had five vacancies in early 1985 with only five active circuit judges for a court of ten authorized judgeships. You can imagine the desperation that we had then in trying to form panels. You build up a backlog and you have to work and work to get that out. And our backlog is unfortunate—we regret it, but I have no apology. Our judges are working strenuously.

It was shocking to Chief Justice Burger when he inquired in March of 1985 at the Judicial Conference how many vacancies different courts had and I said, "five, half our full complement." And I know he and the other conference members were astounded. But, the other circuits have been very kind to try to help us.

How many staff attorneys does your circuit have?

We have 10. As you may know, the formula generally is based on a ratio of one staff attorney to each active judge. However, that does not mean that the staff attorneys are assigned to individual judges. They are not. They are a unit working for the court under the direction of our fine Senior Staff Counsel, Jack Kleinheksel, and our Supervising Staff Attorney, Betty Page. They and the other eight do a very important job for us. I think their most important and helpful contribution at this time is their intense work on our summary dispositions.

In our court, as in many courts, after an appeal is noticed, the appeals expediters, Kathleen Clifford and Ellen Rich, who are deputy clerks in the clerk's office, single out cases that look as though they might be candidates for summary disposition because of a jurisdictional defect or because the case is not a substantial one due to controlling Supreme Court precedent or Tenth Circuit precedent which makes the claim very unsubstantial. Those appeals are then referred to the staff attorneys. Memorandum briefs are ordered in quickly from both sides in typewritten form,

William J. Holloway, Jr.

and the staff attorneys work from those briefs and the records. They study those intensely and recommend to us those which they think can be summarily disposed of. They prepare two important documents for us—a dispositional memorandum giving an outline in detail of the record and their legal research, and a proposed order and judgment. In 1986 there were 464 cases submitted to panels by this process and 434 were decided by these two- or three-page orders and judgments.

These summary dispositions are not handled just in the mail and quickly and with any lack of concentration. The records and these memorandum briefs are sent out to the panel of judges in advance some two or three weeks before they come to Denver. In Denver they confer with the staff attorney who presented that case, and they direct the staff attorney what to do. If any one judge decides the case is substantial, he can blow the whistle and put it back on track for full briefing and argument; or the panel may decide they want to direct the staff attorney to make some revisions in the proposed order. He does it through the word processor, brings it back in a few hours, they adopt it, perhaps, and they are ready to issue. At these conference terms, which are every other month, they are disposing of 80 to 90 cases each term, each of these panels of three judges.

You use the word *unsubstantial*. Are you using it in the same sense that we use *frivolous*?

I somewhat dislike using the term *frivolous* because I think it might be deemed a derogatory term by the litigants and I shy away from it. More often I say *unsubstantial* and I favor that terminology. I realize *frivolous* is in the statutes and rules, but I prefer not to use it. These are people's cases and I don't like to have them think we treat them as frivolous.

The Tenth Circuit is the only circuit to have its own print shop. Was that in place when you became chief?

Yes. It had been in place for a long time. I've been on the court almost 1 years, and it was there before m time. Chief Judge Orie Phillips an Chief Judge Alfred Murrah both fa vored it very strongly. We have alway felt that it is a very substantial savin to the government, and Dewey Heis ing, chief of the Financial Manage ment Division at the Administrativ Office, has confirmed that. We hav Xerox 9500 equipment. We produc all of the opinions that are filed by th court. Each judge who authors a opinion sends his opinion to the cle with directions to lock it in the vau where it is held for security; the when the concurrences in the case a received we inform the clerk to file th opinion. Within one hour an opinio of 20 pages can be reproduced wi the 300 copies we need, and they ca be filed that day and distributed. W find it rapid, efficient, and very ec nomical for the government. Last ye we filed and reproduced them th

way, some 368 opinions, 318 orders and judgments—up to 3, 4, even 10 pages; and about 9,400 copies of a new version of our rules of the court of appeals. I know others differ, but from our standpoint I see no reason for the cost of a printing contract.

Colorado and Oklahoma have been economically depressed in recent years. How has this been reflected in the Tenth Circuit's bankruptcy filings?

They have risen dramatically. Yesterday the announcement was made that the bank at Mustang, Oklahoma, had failed the day before, which was the sixty-third bank failure in Oklahoma since the Penn Square Bank failure in July 1982. This gives you a perspective on the extent of the economic conditions in Oklahoma that we are suffering. The First National Bank of Oklahoma City and the First National Bank at Enid are two of the victims, and there is a large increase in the filings in bankruptcy in the Western District of Oklahoma. For example, from just July 1986 through June 30, 1987, 9,315 bankruptcy cases were filed in the Western District of Oklahoma. Of course that does not, in any way, tell it all. Included in that number were 257 Chapter 11 reorganization cases, which involve extraordinary work, 8,374 were Chapter 7 liquidation cases, and then smaller numbers of the others.

How many of those cases involved the oil business?

Quite a large amount. And of course agricultural cases under the Chapter 12 provisions, the new provisions that Congressman Synar and others sponsored. In Colorado just from January 1, 1986, to December 31, 1986, they had total bankruptcy filings of 12,760 cases and there were 445 Chapter 11s. Other courts are helping us. Chief Judge Lively told me that he signed an order to allow a bankruptcy judge from the Sixth Circuit to come to help us. Chief Judge Lay and his circuit have helped us. We have recalled retired bankruptcy judges to help.

Is the oil industry in your circuit in a very bad situation?

Oh, yes; it is a severe situation. Of course, the West Texas crude figure is the index we watch, and the price is not favorable yet. It's been a little better than it was when it was down to $13 or a little less. Now it is up; I would say the oil industry is showing signs of some rebirth, but it will depend strictly on the reasonableness of the importation that is made of oil. If there can be a reasonable limit on that without harming consumer interests and we can have increased production and exploration domestically, then we can have a rebirth of the Oklahoma, Colorado, and Kansas oil industries. It hit all the states in the Tenth Circuit heavily—including New Mexico, Utah, and Wyoming.

"I somewhat dislike using the term *frivolous* because I think it might be deemed a derogatory term by the litigants and I shy away from it. . . . These are people's cases, and I don't like to have them think we treat them as frivolous."

The supply companies have had enormous bankruptcy filings. The companies owning the drilling rigs have taken heavy losses. The producers—the large and small producers—have suffered terrible losses because of the depressed price of crude oil. And, it is sort of a double whammy for the farmers—they are affected because not only are we suffering an agricultural depression, but the farmers in large areas depend on royalty income and their royalties are way down because of the decrease in production of oil and gas.

They own the mineral rights under their farm lands and when they make an oil and gas lease they are entitled to, and have in the lease generally, a one-eighth royalty. And so when the royalty income of the farmer is depressed because the gas and oil takes are so much less, the income off of them is less. The farmers suffer not only because their agricultural income is down but because their supplementary royalty income is reduced.

What about your automation activity?

Well, we are doing a great deal. We were a pilot circuit and are now completely on the AIMS system for the entry of all cases filed in the Tenth Circuit Court of Appeals. We did that over a year ago, so all of the data is able to be accessed by the computer. It is stored in the computer, accessed from the computer, and maintained there for the benefit of the judges, and for the important usage of the Clerk's Office. Our Judge John Moore is able to access the information from his Denver chambers for the use of himself and his staff. He can, through automation, pull up the style of the case, the names of counsel involved, the controlling issues that are summarized under an indexing system, and other data that the judge may need.

In the district courts, the clerks' offices are presently using the Personal Computer (PC AT equipment) for a number of programs including financial applications and case status information. The district courts are also using these PCs for administrative programs and for personnel and furniture. William King is developing additional applications for the district courts' use in the near future. In the district of Colorado their Central Violations Bureau is using completely automated records on the violations. The district of New Mexico has the so-called four-phase system allowing them to keep track of potential jurors for service, and they generate also by computer the vouchers and compute the pay due and issue checks. The district of New Mexico also keeps track of cases entered for each judge and creates indices of the parties in-

See HOLLOWAY, page 8

HOLLOWAY, from page 7

volved in their cases. They run Speedy Trial Act reports through their computers.

The bankruptcy courts, I think, are one of the most critically important areas for the use of automation because of the enormous volume of work. The bankruptcy courts in the Tenth Circuit are experiencing a large growth in filings, as I said, and they are dealing with this by utilizing the personal computers in providing statistical information to the Administrative Office. The district in Wyoming is the only Bankruptcy Court that I believe now uses a modified so-called NIBS BUMS system for full docketing.

Are there any innovations in bankruptcy case management in your circuit?

Well, one thing that is being examined by us again—we have considered it before and didn't adopt it—are the appellate bankruptcy panels. They are in use for the Ninth Circuit, and I understand that Chief Judge Browning feels that they are most useful. These are special panels of bankruptcy judges where parties have the option to either carry their appeal to the federal district courts and then up to the court of appeals or through bankruptcy appeals panels. That is a procedure we are going to reconsider very shortly.

What has been your circuit's experience with certification of state law questions to the highest courts of the states?

This is one of my very strong interests. It is not, I will have to admit, a mechanism that is a large-volume solution to problems of the appellate courts, but I think it is a very important device that has not been appreciated fully. As you may know, the first certification statute was adopted in 1945 in Florida. In *Clay v. Sun Insurance Co.* the Supreme Court in 1960 commended the rare foresight of the Florida legislature in adopting a statute permitting reference of questions to the Supreme Court of Florida from the federal courts. Since then, 24 states and the Commonwealth of Puerto Rico have adopted either statutes or rules. Every state in the Tenth Circuit has authorization for their Supreme Court to answer. Justice Marian Opala of our Oklahoma Supreme Court tells me that the Oklahoma Supreme Court deems it an honor to be asked to respond to a question.

"We are now completely on the AIMS system for the entry of all cases filed in the Tenth Circuit Court of Appeals."

But they don't all feel that way?

That's true, they may not. Secondly, Justice Opala says they give certified questions priority. Third, they have never declined to answer a certified question, which, of course, is their right and within their discretion. The point is that there is a failure, I feel, to realize the usefulness of this procedure. This not only is a mechanism available in diversity cases but in Federal Tort Claims Act cases. That statute incorporates state law, and it is very often a controlling question. We had one about a statute of limitations under a new statute relating to medical malpractice in Colorado. It was terribly important to get a decision. A question of state law in Kansas also arose in the federal tax case field. We certified a question under Kansas probate law, on which the case actually turned, although it was a federal tax refund suit. We got a decision from the Kansas Supreme Court and promptly were able to dispose of the case ourselves without guessing on state law. But, I think it is most important in cases such as one involving a question we certified to the Supreme Court of Wyoming. That case involved the construction and application of the state securities laws, the question of whether an oil and gas investment of a certain type was a security within the meaning of that statute. Why should the federal court try to decide basic questions of state policy of such importance? We certified the question to the Supreme Court of Wyoming in that case over the objection of both sides. But we think we handled this right.

What objections were raised?

Of course, one side had already won. They didn't want it to be reheard. I think the other side thought perhaps there would be a delay. They feel there is delay. I don't. I think there is not delay because the state courts do give priority to the cases. They answer the question and we proceed. In a matter of months we will have the response from the state court, not only for us but for all—for all the federal district judges in Wyoming and for all the panels of the court of appeals that may have similar questions. Justice Douglas concluded in the *Lehman Brothers* case that certification in the long run saves time; that it is a judicial economy; and that it helps build a cooperative judicial federalism. ■

"The bankruptcy courts . . . are one of the most critically important areas for the use of automation . . . ."

RETIREMENT, from page 3

nd Human Services recently re-ersed an earlier position and now olds that senior judges are entitled to rimary health insurance coverage rom Medicare.

One variation on the judicial au-hority of a senior judge arises in con-ection with in banc proceedings. ection 46(c) of title 28 provides that a ourt in banc "shall consist of all cir-uit judges in regular active service . . except that any senior circuit udge . . . shall be eligible to partici-ate . . . as a member of an in banc ourt reviewing a decision of a panel f which such judge was a member."

Magistrates and bankruptcy judg-s. Bankruptcy judges and magis-ates who were appointed before Jan. 1984, are covered by the Civil Serv-e Retirement System (CSRS); those ppointed after that date, with some xceptions, are covered by the Federal mployees Retirement System FERS), which is applicable to federal mployees generally. The Magistrates etirement Parity Act of 1987, Pub. L. o. 100-53, amended Chapter 83 of 5 .S.C. to include magistrates and ankruptcy judges in the category of mployees who receive a CSRS an-uity computed at an enhanced rate 2.5 percent of average annual pay for the years of creditable service. This credit is given for service as a referee in bankruptcy, a bankruptcy judge, a U.S. magistrate, or a U.S. commissioner, and up to five years of military service. No additional contributions are required for this retroactive annuity benefit, but future contributions will be at the rate of 8 percent of basic pay. (Bankruptcy judges have been paying this 8 percent rate since Jan. 1, 1984.)

Under the Act, magistrates and bankruptcy judges under CSRS now have the same retirement options. They may retire at age 62 after completing 5 years of civilian service or at age 60 after completing 10 years of service as magistrate or bankruptcy judge. Under 28 U.S.C. § 8336, they may also be entitled to an immediate annuity after becoming 55 years of age with 30 years of service. The Act applies to all magistrates and bankruptcy judges covered by CSRS who were holding office on Oct. 1, 1987. Magistrates and bankruptcy judges appointed after that date will receive these benefits if they are covered by CSRS. The Act does not apply to magistrates or bankruptcy judges who are covered mandatorily by the new FERS or to those who elected to withdraw completely from CSRS.

Probation and pretrial services officers. The Office of Personnel Management (OPM) has issued regulations concerning the treatment of law enforcement officers under FERS. Law enforcement officers pay larger contributions to the retirement system than other employees and receive a more generous annuity, but are subject to a maximum age for entry on duty as well as a mandatory retirement age. In addition, the agency contribution for law enforcement officers is larger than its contributions for other employees. The OPM regulations delegate to the Director of the AO the authority to certify which positions in the judicial branch are to be treated as law enforcement officers under FERS. In essence, the Director has designated the positions covered as law enforcement positions under CSRS as also covered as law enforcement officer positions under FERS. These positions include probation and pretrial services officers and probation officer assistants.

Other judicial employees. Federal employees who entered on duty on or after Jan. 1, 1984, including bankruptcy judges, magistrates, judges of the U.S. Claims Court, and all other

See RETIREMENT, page 10

EGISLATION, from page 2

andatory jurisdiction; abolishment the Temporary Emergency Court of ppeals; improvement of the admin-trative operation of the jury system allowing judges to authorize the erk of court to grant temporary ex-ises to jurors; changes in the lemaking procedures for federal urt rules; and statutory authoriza-on for experimental court-annexed bitration in 13 districts, with an ad-tional 10 districts to be approved by e Judicial Conference. The bill also ntains provisions that have not been dressed by the Judicial Conference. dge Elmo Hunter (E.D. Mo.) testi-d on H.R. 3152 on behalf of the Judicial Conference with respect to the provisions that the Conference recommended.

ABA President Robert MacCrate also testified concerning H.R. 3152.

- The House Subcommittee on Criminal Justice met in executive session to continue to discuss the inquiry into the possible impeachment of Judge Alcee L. Hastings (S.D. Fla.). The full House voted to release the report on Judge Hastings prepared by an investigating committee of five federal judges and submitted to the 11th Circuit Judicial Council. The Judicial Council certified to the Judicial Conference of the United States that it had determined that Judge Hastings had engaged in conduct that might constitute one or more grounds for impeachment, and the Judicial Conference certified to the House its determination that consideration of impeachment may be warranted. The Judicial Conference transmitted the report of the investigating committee and other materials to the Speaker of the House on Mar. 17, 1987. 28 U.S.C. § 372(c)(14)(A) authorizes the House to release material "which is believed necessary to an impeachment investigation or trial of a judge." Under the House Resolution, the report of the investigating committee is to be made public, and all other papers, documents, and records of proceedings transmitted to the House in the matter are to be released "to the extent ordered by the Committee on the Judiciary." ■

RETIREMENT, from page 9

judicial employees (but not Article III judges), have been covered by FERS since Jan. 1, 1987, unless they had five years of creditable civilian service on Dec. 31, 1986. Employees not mandatorily covered under FERS have until Dec. 31, 1987, to elect to participate in FERS. Information about FERS has been sent to all employees to assist them in making this decision.

The annuity under FERS (1 percent of annual salary times years of service) is supplemented by Social Security benefits and the voluntary 401(k)-type thrift savings plan. An employee may contribute up to 10 percent of salary to the plan, subject to IRS limitations. The government automatically contributes 1 percent of salary annually and matches employee contributions up to a total of 5 percent of salary annually.

Pending legislation. As endorsed by the Judicial Conference, S. 1482, the Judicial Branch Improvements Act of 1987, would amend 28 U.S.C. § 371 to permit senior judges and judges retiring under § 371(a) to receive military retired or retainer pay they would be entitled to on the basis of regular or reserve military service.

With the endorsement of the Judicial Conference, bills have been introduced in each house of Congress that would provide a retirement annuity for all bankruptcy judges and full-time magistrates, equal to the full salary of office after 14 years of service, payable at age 65. The bills are H.R 2586 and S. 1630, the Retirement and Survivor Annuities for Bankrutpcy Judges and Magistrates Act of 1987. The right to an annuity would ves after 8 years of service. Annuities fo retirees with 8–14 years of servic would be computed proportionally b dividing the years of service by 14.

Rep. Sonny Montgomery (D-Miss has introduced H.R. 3358, a bill t amend 28 U.S.C. § 376 to allow cos of-living adjustments in judicial su vivors annuities and to increase exis ing annuities by 10 percent.

Position Available

Clerk, U.S. Bankruptcy Court, S.D. Ill. Salary $53,820–69,976. Responsible for managing the administrative activities of the court. Requires minimum 10 years' progressively responsible administrative experience in public service or business, at least 3 years in a position of substantial management responsibility. College education may be substituted for up to 3 years of general experience, law degree may be substituted for 2 additional years. Submit application by Nov. 16, 1987, to Thomas M. Crain, Clerk, U.S. Bankruptcy Court, 750 Missouri Ave., 1st Floor, East St. Louis, IL 62201.

EQUAL OPPORTUNITY EMPLOYER

NOTEWORTHY, from page 4

an ABA-accredited law school and mu be in active service; course work must completed in two six-week summer se sions (though this work may also spread over a six-year period in two- four-week segments); and a thesis is r quired. Thirty-nine candidates from nin teen states are already enrolled for t 1988 term.

Through a grant from the State Justi Institute, 60 scholarships of up to $1,0 per judge will be awarded for the 19 calendar year. For further information co tact Neal Ferguson, MJS Program, 335 C lege Inn, University of Nevada, Reno, N vada 89557.

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A Holiday Message from the Chief Justice

I send holiday greetings to my fellow judges and all of the Federal Judicial family who have worked loyally and ably in the administration of justice this past year. After a little more than a year as Chief Justice, I have a renewed appreciation of the need to work together to maintain the efficiency and responsiveness of the Third Branch." In this—the 200th year of our Constitution—we should remind ourselves that equal justice under law is an ideal towards which all of our efforts must be continually directed.

William H. Rehnquist

No individual exemplified the commitment to justice under law better than Justice Lewis F. Powell, who retired from the Court in June of this year. His fifteen years of distinguished service as Associate Justice capped a truly distinguished career as a lawyer, private citizen and public servant. His colleagues will miss the presence of this wise, reflective and gentle man; we wish Lewis Powell and his wife, Jo, a retirement blessed with good health.

A special note of appreciation is due to retired Chief Justice Burger for his distinguished service as head of the Bicentennial Commission. The national observance of the 200th year of our Constitution has been a splendid celebration of what British historian J. R. Pole described as "the gift of government."

See REHNQUIST, page 8

Congress Weighs Enhanced Retirement Coverage For Bankruptcy Judges and Magistrates

The following measures are among those in the House and Senate that are of interest to the judiciary.

Retirement and survivor annuities for bankruptcy judges and magistrates. Subcommittees of both the House and Senate Judiciary Committees held hearings on bills that would provide for enhanced retirement and survivor annuities for bankruptcy judges and magistrates. The House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, chaired by Rep. Robert W. Kastenmeier (D-Wis.) held a hearing on H.R. 2586, the Retirement and Survivor Annuities for Bankruptcy Judges and Magistrates Act of 1987. The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held a hearing on S. 1630.

Judge Morey Sear (E.D. La.), chairman of the Judicial Conference's Committee on the Administration of the Bankruptcy System, and Judge Otto R. Skopil, Jr. (9th Cir.), chairman of the Conference's Committee on the Administration of the Federal Magistrates System, testified in support of the bills. Judge Robert R. Merhige, Jr. (E.D. Va.), a member of the Conference's Committee on the Administration of the Bankruptcy System, also testified in support of the bills.

The bills provide that bankruptcy judges and magistrates will receive an annuity payable at the rate of 1/14 of salary at the time of retirement for

See LEGISLATION, page 4

Congress Passes Amendments to Sentencing Act

Congress has passed S. 1822 as amended, the "Sentencing Act of 1987," amending the Sentencing Reform Act to make clear that the guidelines apply only to conduct committed on or after Nov. 1. S. 1822 also originally contained a title modifying criminal fine provisions. The House has passed a criminal fine improvements bill, H.R. 3483 (see "Criminal fines," p. 5.) The Senate had passed a similar criminal fines measure in an earlier version of S. 1822, but the House felt it would be better for all sentencing amendments to be in one bill and all fine provisions in a separate bill.

S. 1822 as passed clarifies the standard for departure from the sentencing guidelines under 18 U.S.C. § 3553(b), stating that "in determining whether a circumstance was adequately taken into consideration [by the Sentencing Commission], the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Other provisions of the Sentencing Act of 1987 concern review of a sentence for which there is no applicable guideline; supervised release; the determination of guideline sentencing for prisoners transferred pursuant to treaty from foreign countries; the elimination of the requirement for

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petty offense guidelines; and the authority of the director of the AO to contract for psychiatric aftercare for probationers and parolees.

Some of the provisions contained in S. 1822 had been requested by witnesses at a Senate Judiciary Committee hearing held shortly before the Nov. 1 effective date. At that hearing, the committee heard testimony from Judges Edward R. Becker (3d Cir.), A. David Mazzone (D. Mass.), and Gerald B. Tjoflat (11th Cir.). Judges Becker and Mazzone represented the Judicial Conference. Judges Tjoflat and Mazzone are members of the Judicial Conference Ad Hoc Committee on Sentencing Guidelines, and Judge Mazzone is chairman and Judges Becker and Tjoflat are members of the FJC Committee on Sentencing Guidelines Education. Also appearing before the committee were six of the seven members of the Sentencing Commission, Assistant Attorney General William Weld, and representatives of the ABA and the Federal Probation Officers Association.

Judges Becker and Mazzone expressed concern that, given the short time remaining before the guidelines took effect, there would be problems in conducting adequate training. Although the judicial branch was doing its best to prepare all judicial personnel for guideline sentencing, the judges said, "we can expect significant uncertainty." The judges were also concerned about funds for transcripts of sentencing hearings, preparation of local rules, and the impact of guideline sentencing on appellate courts. Accordingly, the judges asked on behalf of the Executive Committee of the Judicial Conference for a delay of three months "to give these guidelines the best possible chance of becoming a milestone in sentencing reform." They also urged that Congress clarify the question of the guidelines' applicability only to conduct committed on or after the Nov. 1 effective date.

Judiciary Committee Chairman Sen. Joseph R. Biden, Jr. (D-Del.) issued a statement saying that he was "eager for the guidelines to go into effect as soon as possible."

Assistant Attorney General Weld expressed the Department of Justice's "strong support" for the guidelines and opposed any delay in their effective date. He presented a draft bill jointly worked out among the staffs of the AO (pursuant to amendments approved by the Judicial Conference), the Sentencing Commission, and the Justice Department, which served as the basis for S. 1822.

Tommaso D. Rendino, a U.S. probation officer in the District of Vermont and president of the Federal Probation Officers Association, stated that "the guidelines mean more work for us, both quantitatively and qualitatively," because "the presentence investigation phase of the process will take more hours to complete and the level of responsibility placed on probation officers will be increased." Describing the probation service as "the key element in the new guideline sentencing," he pointed to the importance of the intensive training already under way.

Judges Gerald B. Tjoflat (11th Cir.), Edward R. Becker (3d Cir.), and A. David Mazzone (D. Mass.) (left to right) testify before the Senate Judiciary Committee hearing on the sentencing guidelines.

Training on Guidelines

Since late October, federal judges, probation officers, magistrates, federal defenders, and others have been attending guideline sentencing orientation programs held at the local level and administered primarily by the district court probation offices. The Federal Judicial Center, in cooperation with the U.S. Sentencing Commission, sponsored three regional seminars in October to prepare at least one probation officer and one district judge from each court to provide others in their court with an initial orientation to the guidelines.

The Center adopted this basic approach, first announced last May, in order to provide the courts with maximum flexibility in meeting their guideline training needs, and because the approach could be cancelled quickly if Congress enacted a last-minute delay in the guidelines' effective date.

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THE THIRD BRANCH

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1987 Circuit Judicial Conferences Focus on Bicentennial of United States Constitution

Bicentennial themes were the focus of the 1987 circuit judicial conferences.

The First Circuit Judicial Conference was held in Danvers, Mass. A panel including Judge Pierre N. Leval (S.D.N.Y.), a private practitioner, and a journalist discussed "The Press, the Bar, and the Courts," and a panel moderated by Judge Rya W. Zobel (D. Mass.) and including Chief Judge Jack B. Weinstein (E.D.N.Y.) discussed the use of experts in civil and criminal cases. Solicitor General Charles Fried spoke, and Judge John C. Godbold, director of the FJC, gave the luncheon address. Judges Stephen G. Breyer (1st Cir.) and A. David Mazzone (D. Mass.) discussed the sentencing guidelines.

The annual Judicial Conference of the Second Circuit met in Hershey, Pa. Chief Judge Wilfred Feinberg reported on the work of the circuit, and Justice Thurgood Marshall, the circuit justice, spoke. The conference included panel presentations on first amendment topics and workshops on several issues. The panels, introduced by Judge James L. Oakes (2d Cir.), chairman of the conference, considered defamation issues, "equalization" of free speech opportunities, and commercial free speech. Yale University President Benno C. Schmidt, Jr., was the dinner speaker. Judges and conferees elected to participate in one of several workshops, on the topics of separation of powers, sexual equality, and the framers' intentions as to the functioning of the federal courts.

The 50th Annual Third Circuit Judicial Conference was held in Philadelphia in conjunction with the celebration of the bicentennial in the Constitution's city of origin. Chief Judge John J. Gibbons presided over a program that included such special events as a private showing of 40 original documents from the Constitutional Convention. A panel discussion on the Constitution's past featured Columbia University Law School Dean Barbara A. Black, former Secretary of Transportation William T. Coleman, Jr., and Judge John T. Noonan, Jr. (9th Cir.). A discussion on the Constitution's future featured Anthony Lester, Q.C., from the United Kingdom; Anthony Lewis of the *New York Times;* former Judge Edmund B. Spaeth, Jr.; and Chief Judge Patricia M. Wald (D.C. Cir.). Chief Judge Gibbons and Judge Ruggero J. Aldisert (3d Cir.) gave "a toast to the Constitution and to visiting chief circuit judges," and Chief Judge Gibbons made special remarks honoring retired Justice Lewis F. Powell, Jr.

Chief Judge Harrison L. Winter welcomed conferees to the 57th Judicial Conference for the Fourth Circuit, held in Hot Springs, Va. Chief Justice William H. Rehnquist, the circuit justice, addressed the conference. Professor A. E. Dick Howard of the University of Virginia Law School spoke on "Roots of the American Constitution," Professor Irving Younger spoke on "*Ulysses* in Court," and a panel of professors reviewed major Supreme Court decisions of the October 1986 term.

Chief Judge Charles Clark opened the 44th Annual Judicial Conference of the Fifth Circuit, held in New Orleans, La. Attorney General Edwin Meese III and business leader H. Ross Perot addressed the conference. Panels considered such topics as the fraternity of courts and lawyers; judgments without trials; recent Supreme Court decisions; sanctions; and new developments in bankruptcy. Duke University Law Professor Walter E. Dellinger III spoke on "The Summer of 1787."

The 48th Annual Conference of the Sixth Circuit, held in Grand Rapids, Mich., was devoted to the theme "The Living Constitution: Into the Third Century." Chief Judge Pierce Lively welcomed the conferees, and Justice Antonin Scalia, the circuit justice, addressed the conference. Panel discussions were devoted to such constitutional topics as search and seizure, the commerce clause, and the roles of the President and Congress in foreign affairs. Former President Gerald R. Ford served as one of the commentators on the foreign affairs panel.

At the Seventh Circuit Judicial Conference in Chicago, Chief Judge

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University of Virginia Announces 1988 Degree Program for Judges

The University of Virginia Law School is currently receiving applications for its Graduate Program for Judges, scheduled to begin in the summer of 1988. The program is designed for federal and state appellate judges. U.S. district judges will be considered for admission, although only a few places are available for trial-level judges. Total enrollment is limited to 30.

The program is taught mainly by full-time law faculty members at the University of Virginia. Its focus is on historical, jurisprudential, interdisciplinary, and comparative material. Judges who successfully complete the program receive the degree of Master of Laws in the Judicial Process.

The program requires attendance at two consecutive summer resident sessions of six weeks each at the law school in Charlottesville. The 1988 and 1989 sessions will both run from June 29 through Aug. 9. The deadline for applications is Jan. 29, 1988; preference may be given to applications submitted earlier.

Application forms and full information can be obtained by calling or writing the Program Director, Professor Daniel J. Meador, University of Virginia Law School, Charlottesville, VA 22901, (804) 924-3947. Professor Meador advises that funds in the program are sufficient to cover all expenses of federal judges who are enrolled.

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each year of service up to 14 years. Thus, upon reaching 65 years of age, a bankruptcy judge or magistrate with 14 years of service could retire on full salary. The annuity benefit would vest after 8 years of service. Judge Sear noted that attracting and retaining the most qualified individuals to serve as judges depends upon offering "the promise of adequate financial protection upon reaching age 65." Since the *Bankruptcy Code* became effective on Oct. 1, 1979, 52 bankruptcy judges have resigned from office; Judge Sear testified that in addition to being fair to bankruptcy judges, "the legislation should also have the practical effect of keeping judges on the bench for longer periods of time."

Judge Skopil said that "the present retirement system renders it virtually impossible for a magistrate appointed in mid-career to earn a suitable pension" and threatens "to reverse the important strides made in the development of the [magistrate] system." Since the 1979 amendments to the Federal Magistrates Act, he noted, nearly 60 full-time magistrates have left office prior to attaining their retirement eligibility.

Appointment of independent counsel. The House of Representatives passed H.R. 2939, reauthorizing for five years, with minor changes, the procedure providing for the appointment of independent counsel. The Senate has passed a similar measure; the bills will now go to conference.

Vaccine injuries. Rep. Norman F. Lent (R-N.Y.) and Rep. John J. Duncan (R-Tenn.) have introduced H.R. 3546, to amend the National Childhood Vaccine Injury Act of 1986. That act set up a no-fault compensation program for vaccine injuries, which was to be administered by the district courts. However, by its terms, the program was not to take effect until specially funded (see *The Third Branch*, Sept. 1987, p. 5, and October 1987, p. 6 (comments of Assistant Attorney General Richard Willard)).

The House Energy and Commerce Committee recently approved modifications to the original program. The modifications would provide separate funding for future and past cases: children injured before Oct. 1, 1988, would receive compensation for all medical expenses from appropriations authorized by the Energy and Commerce Committee; those injured after Oct. 1, 1988, would be compensated from a trust fund financed by a new excise tax. The modified plan would limit the number of cases paid from the trust fund to an average of 150 every 12 months. If more than 150 awards were paid, the Secretary of Health and Human Services would be required to notify Congress and close the program to new applications after six months. Subsequent to these Energy and Commerce Committee modifications to the plan, the House Ways and Means Committee authorized creation of the trust fund and authorized the special excise taxes for a period of only four years.

H.R. 3546 would retain the basic provisions of current law regarding eligibility for compensation and the types of economic injuries to be compensated, but would establish a new Vaccine Compensation Board to adjudicate claims for compensation. The compensation scheme would be

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Study on Home Confinement Released by FJC

The use of home confinement (also termed *house arrest* or *home detention*) is on the rise. A newly available FJC report, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, by Paul Hofer and Barbara Meierhoefer of the Center's Research Division, found 12 districts where offenders have been sentenced to home confinement as a condition of probation. Other districts have used home confinement as a condition of pretrial release, and the Bureau of Prisons and the Parole Commission have included it as the main feature in the curfew parole program of supervised early release from prison.

For electronic monitoring of those sentenced to home confinement, offenders are telephoned intermittently by computer or required to wear radio transmitters to verify their presence at home. This has been used by only one federal district so far but is planned for the near future in four more districts. The features of state programs and supervision plans in federal districts not using electronic monitoring are described by the authors to help districts develop a program suited to their needs.

Although home confinement programs and electronic monitoring are still new, the authors conclude from this preliminary study that low-risk offenders can be identified and safely controlled in the community.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed mailing label, preferably franked (4 oz.), but do not send an envelope.

CALENDAR

Dec. 4 Judicial Conference Committee on the Judicial Branch
Dec. 7–8 Judicial Conference Committee on Administration of the Magistrates System
Dec. 8–9 Judicial Conference Committee on Judicial Resources
Jan. 6 Workshop for Judges of the Eighth and Tenth Circuits
Jan. 7–8 Judicial Conference Committee on Administration of the Bankruptcy System
Jan. 8–9 Judicial Conference Advisory Committee on Bankruptcy Rules

As this issue goes to press the composition and membership of several committees are not final. However, tentative dates have been set for meetings in anticipation of the Mar. 15–16, 1988, Judicial Conference session. Committee chairmen and members will be notified personally to confirm the arrangements for their respective meetings.

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based on the worker's compensation model; vaccine manufacturers would be required to purchase insurance, or to self-insure, and the cost of securing the insurance would be a function of the manufacturer's prior experience in paying compensation for vaccine injuries. In introducing the bill, Rep. Lent noted constitutional concerns that have been raised about the National Childhood Vaccine Injury Act of 1986. He stated that "by vesting, as it does, the responsibility for administering the compensation program in the district courts, the law runs afoul of" Article III's "case or controversy" requirement.

Criminal fines. The House of Representatives has passed H.R. 3483, as amended, known as the Criminal Fine Improvements Act of 1987, and the Senate had passed essentially the same provisions in S. 1822 (see story on amendment of the Sentencing Reform Act, p. 1). H.R. 3483 reflects an agreement between the Department of Justice and the AO as to how criminal fines shall be collected. During a 12-month transition period, it returns the responsibility for the receipt of fines to the clerk of court. Under the present practice, the U.S. Attorney's office is responsible for receipt of fines. Collection functions incident to the judicial enforcement of fines remain with the Justice Department. H.R. 3483 also amends the Sentencing Reform Act to conform its fine provisions with the Criminal Fine Enforcement Act of 1984, which was developed independently of and enacted after the Sentencing Reform Act of 1984. The Criminal Fine Enforcement Act was the product of the House and Senate Judiciary Committees, the Department of Justice, the AO, and the U.S. Parole Commission. These parties agreed that the act's fine provisions were superior to the criminal fine provisions of the Sentencing Reform Act, but there was not enough time near the end of the 98th Congress to merge the two bills.

Marshal's Service. Rep. Robert Kastenmeier (D-Wis.) has introduced H.R. 3551, a bill to amend titles 18 and 28 of the *U.S. Code* with respect to U.S. marshals. The bill, known as the U.S. Marshals Service Act of 1987, is intended to modernize and consolidate existing statutory provisions and to provide a clear statutory basis for the Marshals Service's current responsibilities. The bill would formally establish the Marshals Service as a Bureau of the Department of Justice (the Service currently exists only by order of the Attorney General). The bill also explicitly authorizes the Marshals Service to provide personal protection to judges, U.S. attorneys, and other federal officials, and retains the existing language of 28 U.S.C. § 569(a) relating to the presence of marshals at sessions of court.

Hatch Act. H.R. 3400, a bill to reform the Hatch Act, which governs participation in partisan politics by executive branch employees, was approved by the House Post Office and Civil Service Committee. The bill has more than 280 cosponsors. (Although the Hatch Act does not apply to employees of the judiciary, a long-standing resolution of the Judicial Conference adopted its intent as binding on judicial employees.) ■

PERSONNEL

Nomination

Kenneth Conboy, U.S. District Judge, S.D.N.Y., Nov. 5

Confirmations

William L. Dwyer, U.S. District Judge, W.D. Wash., Nov. 5
David G. Larimer, U.S. District Judge, W.D.N.Y., Nov. 5
James A. Parker, U.S. District Judge, D.N.M., Nov. 5
William L. Standish, U.S. District Judge, W.D. Pa., Nov. 5
Ernest C. Torres, U.S. District Judge, D.R.I., Nov. 5

Appointments

Charles R. Wolle, U.S. District Judge, S.D. Iowa, Aug. 12
Thomas S. Ellis III, U.S. District Judge, E.D. Va., Aug. 28
John D. Tinder, U.S. District Judge, S.D. Ind., Sept. 10
Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., Sept. 11
Stephen A. Stripp, U.S. Bankruptcy Judge, D.N.J., Sept. 15
Joyce Bihary, U.S. Bankruptcy Judge, N.D. Ga., Sept. 17
Irwin I. Katz, U.S. Bankruptcy Judge, N.D. Ill., Sept. 25
Daniel J. Moore, U.S. Bankruptcy Judge, D.N.J., Sept. 30
Irwin N. Hoyt, U.S. Bankruptcy Judge, D.S.D., Oct. 2
Thomas E. Baynes, U.S. Bankruptcy Judge, M.D. Fla., Oct. 6
William Thurmond Bishop, U.S. Bankruptcy Judge, D.S.C., Oct. 9
William H. Brown, U.S. Bankruptcy Judge, W.D. Tenn., Oct. 9
John S. Dalis, U.S. Bankruptcy Judge, S.D. Ga., Oct. 14
J. Wendell Roberts, U.S. Bankruptcy Judge, W.D. Ky., Oct. 16
Margaret H. Murphy, U.S. Bankruptcy Judge, N.D. Ga., Oct. 19
John TeSelle, U.S. Bankruptcy Judge, W.D. Okla., Oct. 19
M. Dee McGarity, U.S. Bankruptcy Judge, E.D. Wis., Oct. 26
Judith K. Fitzgerald, U.S. Bankruptcy Judge, W.D. Pa., Oct. 30
Russell J. Hill, U.S. Bankruptcy Judge, S.D. Iowa, Nov. 2

Resignation

William S. Sessions, Chief Judge, W.D. Tex., Nov. 1

Retirement

Luther B. Eubanks, U.S. District Judge, W.D. Okla., Sept. 1

Senior Status

Carl O. Bue, Jr., U.S. District Judge, S.D. Tex., Sept. 2
John C. Godbold, U.S. Circuit Judge, 11th Cir., Oct. 23

Death

Robert M. Hill, U.S. Circuit Judge, 5th Cir., Oct. 19

CIRCUIT CONFERENCES, from page 3

William J. Bauer spoke on the state of the circuit, and Justice John Paul Stevens, the circuit justice, reported on the work of the Supreme Court. Charles Fried, solicitor general of the United States, also addressed the conference. Following a long-standing tradition, the annual meeting of the Seventh Circuit Bar Association was held in conjunction with the conference.

The Eighth Circuit Judicial Conference, held in Colorado Springs, Colo., was opened by Chief Judge Donald P. Lay. Justice John Paul Stevens spoke on "Liberty Under the Constitution." A panel chaired by Judge Diana E. Murphy (D. Minn.) and including Judges Constance Baker Motley (S.D.N.Y.) and Ruth Bader Ginsburg (D.C. Cir.) addressed the topic "Women and the Constitution." Eighth Circuit judges and other conferees presented a one-act play, *Signers of the Constitution—200 Years Later.* CIA Director William H. Webster, a former judge on the Eighth Circuit Court of Appeals, gave a report on his new position and the implications of "Intelligence and Separation of Powers." Constitutional scholar Bruce E. Fein and Stanford Law School Dean Paul A. Brest conducted a panel discussion on the doctrine of original intention in constitutional adjudication. Former Attorney General Griffin Bell and Justice Stevens responded to comments of the panelists.

The Ninth Circuit Judicial Conference, in Waikoloa, Hawaii, joined the national celebration of the bicentennial by examining the subjects of federalism and the courts' role in constitutional interpretation. Justice Sandra Day O'Connor, the circuit justice, spoke on the Constitution, and Attorney General Meese and Sen. Howell T. Heflin (D-Ala.) addressed the conference. In addition to presenting programs on the Constitution, the conference continued the Judicial Council's three-year examination of the management practices of the courts.

Chief Judge William J. Holloway, Jr., presided over the opening of the Tenth Circuit Judicial Conference in San Diego, Cal. The conference featured programs entitled "A Visit from Supreme Court Justices of the Past" and "The Constitution: Conversations with Thomas Jefferson," in which an attorney portraying Jefferson appeared. Justice Byron R. White, the circuit justice, and Attorney General Meese addressed the conference. Other programs dealt with separation of powers and the Constitution's impact on education.

The Sixth Annual Judicial Conference of the Eleventh Circuit was held in Birmingham, Ala. Chief Judge Paul H. Roney delivered a state of the circuit address, which reported on filings and dispositions in the circuit, Criminal Justice Act and capital cases, and administrative matters. Sen. Heflin and AO Director L. Ralph Mecham addressed the meeting, and Justice Lewis F. Powell, Jr., the circuit justice, reviewed cases decided during the last term of the Supreme Court. The bicentennial presentation included a talk by Judge Thomas M. Reavley (5th Cir.) on lessons that can be drawn from the way in which the framers of the Constitution reached

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Positions Available

Circuit Executive, 1st Cir. Salary to $72,500. Works under direction of judicial council pursuant to 28 U.S.C. § 332(a) and other statutes and rules. Must have B.A. in management or related field, experience in administration or equivalent. Legal training preferred but not required. Certification pursuant to 28 U.S.C. § 322(f) prerequisite to appointment, but applications from qualified noncertified applicants encouraged. Send resumes by Jan. 15, 1988, to Dana H. Gallup, Circuit Executive, U.S. Court of Appeals, 1302 J.W. McCormack Post Office & Courthouse, Boston, MA, 02109.

Assistant Circuit Executive, 7th Cir. Starting salary to $45,763, depending on experience and qualifications. Works closely with the circuit executive and judges of the circuit on administrative and legal court matters. Familiarity with DOS computer systems and a law degree not essential, but will be important considerations in the hiring decision. Open until filled. Position description and salary information available from Circuit Executive's Office, United States Court of Appeals, 219 South Dearborn Street, 27th floor, Chicago, IL 60604.

Technical Assistant, Fed. Cir. Salary: JSP-11-13. Assists in reviewing panel-approved opinions, reviewing briefs, preparing evaluation reports, and advising judges and law clerks on legal or technical matters; conducts technological and legal research; prepares memos; performs other duties as directed by senior technical assistant. Requirements: undergraduate degree in or relating to biological sciences and law degree; bar admission and work experience in intellectual property law, engineering, or technology desirable. Send SF-171 by Apr. 2 to address below.

Deputy Clerk (Case Initiation), Fed. Cir. Salary to $22,458. Receives, reviews, analyzes, and initiates the processing of new cases. Requires responsible clerical or administrative experience; B.A., M.A., or law degree may be considered in place of general experience requirement. Position open until filled. Send SF-171 and resume to Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439.

Clerk-Designate of Court, D. Mass. $63,135 to $72,500. Person selected as Clerk-Designate is expected to succeed to position of Clerk of the Court upon the retirement of the incumbent clerk on Sept. 30, 1988, and during the transition period will function in the role of chief operations officer. Requirements: Bachelor's degree, minimum of 10 years of progressively responsible experience in public service or business, including a minimum of 3 years in a position of substantial management responsibility. To apply, send a letter with resume by Jan. 4, 1988 to Honorable Frank H. Freedman, Chief Judge, U.S. District Court, U.S. Court House, Post Office Square, Boston, MA 02109. Attn: Ms. Lillian Di Blasi, Room 306.

EQUAL OPPORTUNITY EMPLOYERS

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agreement, and remarks by Duke University Law Professor William W. Van Alstyne on the present Constitution and its future.

The 48th Annual Judicial Conference of the D.C. Circuit was held in Hot Springs, Va., with Chief Judge Patricia M. Wald presiding. The subject of sentencing reform was addressed by a panel of participants: Judge Ruth Bader Ginsburg (D.C. Cir.); Judge Louis F. Oberdorfer (D.D.C.); Suzanne Conlon, executive director of the U.S. Sentencing Commission; U.S. Attorney Joseph DiGenova; and Cheryl Long, chief of the Public Defender Service. Other panels made presentations on problems arising under the independent counsel law, the religion clauses, constitutional adjudication and the intention of the framers, and sanctions.

The Fifth Annual Judicial Conference of the Federal Circuit was held in Washington, D.C. Chief Judge Howard T. Markey gave the state of the court address. Judge Robert H. Bork (D.C. Cir.) and Yale University Law Professor Harry H. Wellington discussed constitutional interpretation, and Chief Justice Warren E. Burger (ret.) spoke. Separate breakout sessions were held on the work of the Court of International Trade, the Claims Court, Merit Systems Protection Board cases, and patents and trademarks.

The United States Claims Court held its first judicial conference in Williamsburg, Va. The conference's 85 participants held small- and full-group sessions that analyzed the litigation process in the court. Topics of discussion included summary judgment and other pretrial motions practice, the question of developing small claims procedures in the Claims Court, and the effectiveness of rules and standard pretrial procedures. Other sessions reviewed occurrences and trends in the areas of contracts and pay cases; tax cases; and takings, Indian claims, and patents. A full-group session looked at legislation affecting the court. ■

House Panel Hears Corrections, Parole Officials Discuss AIDS Policies for Prisoners, Parolees

Federal prison and parole officials discussed the effect of acquired immune deficiency syndrome (AIDS) on such issues as the testing of inmates and conditions of parole at a recent hearing of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. J. Michael Quinlan, director of the Bureau of Prisons, and Benjamin F. Baer, chairman of the U.S. Parole Commission, were among those testifying. Donald L. Chamlee, chief of the Division of Probation of the AO, submitted a statement.

In June, it was announced that the Bureau of Prisons would begin a program of testing newly sentenced inmates and all inmates about to be released from prison for antibodies to the HIV virus (the suspected cause of AIDS). The Parole Commission began considering what actions, if any, are appropriate in the case of parolees whom the Commission knows to be antibody-positive. Among the approaches considered were counseling infected individuals; reporting that parolees tested antibody-positive; releasing medical information to the probation officer; requiring as a condition of parole that the parolee disclose his or her condition prior to engaging in behavior that is high-risk for transmission; and other disclosures as directed by the probation officer. Following its July meeting, the Commission published in the *Federal Register* for public comment a series of general questions (52 Fed. Reg. 158 (1987)), and also solicited comments from the Bureau of Prisons, the Probation Division of the AO, the National Institute on Drug Abuse, the President's Commission on AIDS, the Surgeon General, the Department of Justice, and the American Civil Liberties Union.

At the Subcommittee hearing, Mr. Baer discussed the Parole Commission's recent deliberations concerning its policy toward parolees who have AIDS or have tested positive for exposure to the HIV virus. He described the tension between the Commission's desire to protect persons from exposure to AIDS and its concern that it respect the privacy rights of parolees and stay within its legal authority. Noting that the Parole Commission's statute authorizes it to impose conditions of parole on a parolee that are reasonable "to protect the public welfare," Mr. Baer said the Commission had concluded that this legislative phrase charges the Commission with protecting the public from criminal acts, but does not permit it to impose a condition that is only designed to protect the public from the noncriminal spread of a disease. Accordingly, "the Commission does not view itself, under its statute, as having the power to take action directed solely to protecting the public from the spread of AIDS, at least to the extent that activity which would spread AIDS is not also criminal activity," Mr. Baer testified.

Mr. Quinlan testified on the prevalence of AIDS among inmates and on the Bureau's AIDS policy. A pilot program of testing newly sentenced prisoners and all inmates within 60 days of release was begun June 15, 1987. The testing of all incoming inmates was discontinued Sept. 30, 1987, but a 5 percent sample of incoming inmates will be tested. All releasees will continue to be tested, as will those inmates who exhibit any clinical indications of the virus; those who ask to be tested; those who are going to be involved in community activities; and those who have exhibited "predatory and promiscuous behavior." Of 8,832 newly committed prisoners tested, 216 (or 2.44 percent) have tested antibody-positive. Of the 4,430 prisoners tested prior to release, 114 (or 2.57 percent) tested positive. The tested group of newly admitted inmates will be retested to give the Bureau

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information about the risk of acquiring the infection during confinement.

Of a total inmate population of 44,000, the Bureau has 31 inmates with "end-stage AIDS," Mr. Quinlan testified. He noted that inmates who have tested antibody-positive but have no disease symptoms will be continued in the general prison environment; inmates who are going to participate in community activities will be required to notify their spouses of positive test results; and "infected inmates who are sexually active homosexuals or intravenous drug users may require separation from the regular inmate population." Based on interviews of prisoners who have tested positive, intravenous drug use is the high-risk behavior dominant among antibody-positive inmates, Mr. Quinlan said; Bureau efforts aimed at curbing the illicit use of drugs within prison have "shown significant progress in the last two years."

Mr. Chamlee's statement noted the "enormously complex problems regarding the proper criminal justice response to what is, in our view, essentially a public health problem." It described an AIDS workshop that the Probation Division held, with the sponsorship of the FJC, at the National Conference for Chief and Deputy Chief U.S. Probation and Pretrial Services Officers in June, and noted that the Division has held meetings and established dialogues with various agencies concerned, including the Parole Commission, and expressed hope that such communication will enable the Division and the Commission "to develop unified supervision policies" in addressing its responsibilities. ■

REHNQUIST, from page 1

About a year ago I appointed a committee of the Judicial Conference to look into the structure and operation of that body. The Committee met several times and prepared a report with recommendations which were adopted by the Judicial Conference at its September meeting. The thrust of these recommendations was to authorize the appointment by me of a notably strengthened Executive Committee, to streamline the Conference's committee structure and to make committee assignments more readily available to those judges who are interested in having them. I have appointed Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit as Chairman of the Executive Committee, and have appointed Judges Levin H. Campbell, Charles Clark, Paul H. Roney, Aubrey E. Robinson, John F. Nangle, and Robert F. Peckham as members of the Committee.

I wish I could say we had been equally successful in our dealings with the Executive and Legislative Branches of the government; unfortunately we have not. The President drastically scaled down the recommendations to Congress made by the Salary Commission, and Congress did not disapprove them. A modest pay raise for judges thereby went into effect, but I still believe that the salaries of federal judges fall considerably short of what they ought to be.

On November 1, 1987, Congress accepted the United States Sentencing Commission's recommended sentencing guidelines. The Judicial Conference and the Commission had both requested that Congress delay the effective date of these guidelines, but Congress declined to do so. All of us in the Judiciary now must turn to the task of putting these new standards into operation.

Fortunately, enjoyment of the holiday season need not depend on how well the Judicial Branch fared at the hands of the Legislative and Executive Branches. I extend to each of you and your families the very best wishes for a Merry Christmas and a Happy New Year.

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President Reagan Signs Sentencing Reform Act, Criminal Fine Improvements Measures

The following measures pending in ongress are of interest to the diciary.

• The Sentencing Reform Act of 987 (see *The Third Branch*, December 987, at 1) was signed by the President n Dec. 7.

• The Criminal Fine Improvements ct of 1987, which had been passed the House (see *The Third Branch*, ecember 1987, at 5) was passed by e Senate and signed by the Presi- nt on Dec. 11.

• Sen. Paul Simon (D-Ill.) and oth- s have introduced S. 1867, the ourt Interpreters Improvements Act 1987, to amend the Court Inter- eters Act of 1978, 28 U.S.C. § 1827, hich required the AO to establish a program to certify interpreters and to facilitate the use of interpreters in bilingual proceedings and proceedings involving the hearing impaired. S. 1867 would require the development of certification tests in at least eight unspecified languages in addition to Spanish, for which a certification test is already used. Spanish interpretation in 1987 was required in 41,501 proceedings. Currently, the other eight languages for which interpreters are most often requested (and the number of proceedings for each) in the federal courts are Mandarin Chinese (366), Haitian Creole (354), Arabic (277), Sicilian (253), Italian (232), French (230), Thai (190), and

See LEGISLATION, page 2

Death Penalty Habeas Corpus Caseload Prompts Changes Under Revised Criminal Justice Act

An ongoing study of representation the federal courts of defendants ntenced to death, conducted by the dicial Conference Committee on efender Services, has led to the loption of two amendments to the *uidelines for the Administration of the iminal Justice Act*. The first amend- ent provides that an attorney fur- shed by a state or local public de- nder organization, legal aid agency, other private, nonprofit organiza- n may be appointed and compen- ted under the CJA in federal death nalty habeas corpus cases when the urt determines that such an ap- intment will provide the most fective representation. The second nendment authorizes the compen- tion of public and private organiza- ns that provide legal consulting rvices to counsel appointed in such ses. The amendments to the *uidelines* were approved by the Judi- l Conference in March of 1987.

The amendments resulted from the Committee's review of the reports of task forces established by the chief judges of the courts of appeals. In 1986, the Committee (then called the Committee to Implement the Criminal Justice Act) had asked the chief judges to establish task forces to develop information on the impact of the projected influx of death penalty cases reaching the postconviction stage in federal courts. The reports generally concluded that (1) the private bar has neither the expertise nor the resources to provide representation on a pro bono basis, (2) the resources of private nonprofit organizations are dwindling and the attorneys they have recruited are rapidly becoming "burned-out," and (3) federal defender organizations have neither the staffing nor the resources to handle a significant number of federal death penalty habeas corpus cases.

See AMENDMENTS, page 3

Sentencing Guidelines Challenged in Suit By Public Defenders

The constitutionality of the sentencing guidelines that took effect Nov. 1 has been challenged in a lawsuit filed in the U.S. District Court for the District of Columbia. *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Comm'n*, No. 87-3161 (D.D.C. Nov. 23, 1987).

The suit was filed on behalf of two defender organizations, Federal Defenders of San Diego, Inc., a community defender group whose attorneys annually represent approximately 6,000 individuals in the Southern District of California, and the Office of the Federal Public Defender for the Middle District of Tennessee. Plaintiffs' attorneys are from the Public Citizen Litigation Group of Washington, D.C., which filed the lawsuit that challenged the legality of the original Gramm–Rudman–Hollings legislation.

The complaint alleges that Congress made an excessive delegation of legislative authority to the Commission "since the Commission is required to make fundamental policy choices about the appropriate range of sentences for all federal criminal sentences without sufficient guidance

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Korean (154). The bill directs the AO to provide guidelines to the courts on the selection of otherwise qualified interpreters when certified ones are not available.

S. 1867 would require that judicial proceedings where interpreters are used be electronically sound-recorded at the request of a party to the case, and would expand the requirement to use certified interpreters to grand jury proceedings.

- S. 1630, a bill to enhance retirement and survivor annuities for bankruptcy judges and magistrates (see *The Third Branch*, December 1987, at 1), was ordered favorably reported by the Senate Judiciary Committee.
- A bill extending the independent counsel provisions of the Ethics in Government Act for five years was signed by the President Dec. 15. The bill reflected compromises reached in a House–Senate conference report, No. 100-452, following Senate passage of a version that differed somewhat from H.R. 2939 as previously passed by the House. The Senate's version would have allowed the independent counsel to broaden the scope of his or her investigation only after receiving approval from the attorney general. The House version would have permitted the special court that appointed the counsel to authorize such a broadened investigation. The final bill incorporated the Senate version.

Rules Committee Seeks Comments on Proposed Fed. R. Crim. P. 32 Changes

The Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States plans to revise rule 32 of the Federal Rules of Criminal Procedure. This revision is contemplated in light of the sentencing guidelines and the Probation Committee's proposed model local rule for guideline sentencing (circulated to all United States chief circuit and district judges by Judge Gerald B. Tjoflat (11th Cir.) on Aug. 28, 1987). The Advisory Committee, chaired by Judge Leland C. Nielsen (S.D. Cal.), is interested in hearing before its next meeting, May 19–20, about any perceived problems under the sentencing guidelines or under the Probation Committee's proposed local rule that could be rectified by means of a rules change. Comments may be sent to the Advisory Committee on Criminal Rules, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Washington, D.C. 20544.

- The House passed H.R. 3400, amending the Hatch Act, the act that restricts partisan political activity by executive branch employees. The bill has been referred to the Senate Governmental Affairs Committee. (Although the Hatch Act does not apply to employees of the judiciary, a long-standing resolution of the Judicial Conference adopts its intent as binding on judicial employees.)
- H.R. 3461, introduced by Rep. Jack Buechner (R-Mo.) would amend Fed. R. Crim. P. 24(a) to require the court to permit the defendant, or the attorney representing him or her, and the attorney for the government to examine prospective jurors; Rep. Buechner's H.R. 3462 would amend Fed. R. Civ. P. 47(a) to require the court to permit each side to examine prospective jurors. The bills are similar to two Senate bills introduced by Sen. Howell Heflin (D-Ala.) on which hearings were held in 1987, S. 953 and S. 954 (see *The Third Branch*, September 1987, at 5). The Judicial Conference opposes the rules amendments that would be made by Rep. Buechner's and Sen. Heflin's bills.
- H.R. 3442, introduced by Rep. E. Thomas Coleman (R-Mo.), would require groups and individuals receiving or spending more than $5,000 in support of or opposition to a Supreme Court nominee to report their activities to the Clerk of the House.
- Senator Malcolm Wallop (R-Wyo.) has introduced S. 1907, a companion measure to H.R. 3546, to amend the National Childhood Vaccine Injury Act of 1986 (see *The Third Branch*, December 1987, at 4). Both the House and Senate bills would create a new Vaccine Compensation Board to adjudicate claims for compensation, in place of the 1986 act's provision that the district courts administer the compensation program.
- The Senate Judiciary Committee ordered favorably reported S. 1134, intended to deal with the so-called "race to the courthouse" situation (see *The Third Branch*, January 1987, at 7). The House passed a similar measure, H.R. 1162, in May of 1987.
- The Senate Judiciary Committee ordered favorably reported, with an amendment, S. 952, to provide the Supreme Court with greater discretion in selecting the cases it will review.
- Sen. Edward M. Kennedy (D-Mass.) and Sen. Orrin G. Hatch (R-Utah) have introduced S. 1904, which limits the use of lie detector tests by employers. The bill forbids the use of a polygraph in preemployment testing of job applicants or in random testing of employees. The bill would not apply to governmental employers nor in certain national defense and security matters. It would permit the use of a polygraph to investigate specific economic losses, by testing em-

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BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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Duane Lee Heads Court Admin. Division at AO; John Thomas Jones Heads Magistrates Division

AO Director L. Ralph Mecham has announced the appointment of Duane R. Lee as Chief of the AO's new Court Administration Division and the appointment of John Thomas Jones to replace Mr. Lee as Chief of the Magistrates Division.

Duane R. Lee

Mr. Lee has served as Chief of the Magistrates Division of the AO since 1982. He is a graduate of Dartmouth College and George Washington University Law School.

Mr. Jones has served as Assistant Chief of the Magistrates Division since 1983. He previously served as Director of Administration of the U.S. Army Judiciary and as Senior Judge of the U.S. Army Court of Military Review. Mr. Jones is a graduate of the U.S. Military Academy at West Point and of Columbia University Law School.

John Thomas Jones

The new Court Administration Division was created in 1987 (see *The Third Branch*, August 1987, at 1) to take over functions that had previously been performed by the Clerks Division, the Office of Court Reporting and Interpreting Services, the Office of Library and Legal Research Services, and the Office of the Special Assistant for Jury and Speedy Trial Matters. ■

CALENDAR

Jan. 6–8 Workshop for Judges of the Eighth and Tenth Circuits

Jan. 7–8 Judicial Conference Committee on Administration of the Bankruptcy System

Jan. 8–9 Judicial Conference Advisory Committee on Bankruptcy Rules

Jan. 11–12 Judicial Conference Committee on Court Security

Jan. 11–13 Judicial Conference Committee on Judicial Improvements

Jan. 13–16 Judicial Conference Committee on Defender Services

Jan. 14–15 Judicial Conference Committee on Criminal Law and Probation Administration

Jan. 18–19 Judicial Conference Committee on Space and Facilities

Jan. 19 Judicial Conference Committee on Federal/State Jurisdiction

Jan. 22–23 Judicial Conference Committee on the Budget

Jan. 25–26 Judicial Conference Committee on Judicial Ethics

Jan. 25–27 Workshop for Judges of the Ninth Circuit

MENDMENTS, from page 1

A recent study of caseload and cost ojections for federal habeas corpus eath penalty cases prepared at the quest of the AO estimates that 304 fendants sentenced to death will be a position to file federal habeas corus petitions in FY88 and 340 in FY89. ne study was conducted by the angenberg Group and sponsored the Bar Information Program of the BA Standing Committee on Legal d and Indigent Defendants. The rt addresses the serious problems sociated with the provision of coun in postconviction death penalty ses in both state and federal courts d urges cooperation among bar asciations, judges, federal public and mmunity defenders, law schools, d organizations with experience in presenting indigents in death nalty cases.

The task forces have also focussed local attention on what could prove to be a crisis situation in districts with large numbers of state prisoners currently on death row. As a result, a number of federal circuits and districts are actively engaged in developing cooperative resource center programs, which would provide both counsel in individual cases and guidance and support to attorneys appointed in death penalty cases.

Given this interest and activity, the AO recently proposed to conduct a death penalty resource planning meeting in Washington, D.C., to advise on the status of programs under development throughout the federal judiciary and to address common problems and share ideas on how to resolve them. A letter concerning the proposed meeting was sent to all chief judges of the courts of appeals, and it is anticipated that details relating to the meeting will be finalized in the near future.

Another recent Judicial Conference action aimed at assisting the courts in furnishing counsel in federal death penalty cases is the establishment of a special alternative maximum hourly compensation rate for representation in such cases in the four federal district courts in California. The special rate for these cases in California was set at $75 per hour for in- and out-of-court time, as opposed to the "regular" CJA hourly maximums of $60 for in-court time and $40 for out-of-court time. Judicial Conference authority to establish alternative CJA rates was provided only recently as part of the Criminal Justice Act Revision of 1986, which became effective in March 1987. The Committee and the Judicial Conference are expected to entertain additional alternative rate requests from other districts in the coming months. ■

GUIDELINES, from page 1

from Congress"; that the delegation, "even if not excessive, violates separation of powers because the Sentencing Commission is within the judicial, not the executive branch of government"; and that "the mixed composition of the Sentencing Commission, in combination with the method of appointment and the method of removal of its members, violates separation of powers."

In addition, the complaint alleges that the guidelines pose ethical problems for attorneys representing individuals who may be sentenced under the guidelines. The plaintiffs estimate that a substantial majority of their clients sentenced under the guidelines will receive longer sentences than under the prior sentencing system. The plaintiffs claim that the Sixth Amendment and the Code of Professional Responsibility obligate them to raise the claim of unconstitutionality for all their clients who would receive greater sentences under the guidelines than under the prior system. This, however, creates a potential conflict with their representation of clients who will receive lesser sentences than they would have under the prior sentencing system, plaintiffs contend. The complaint states that the plaintiffs might have to seek to withdraw from representing clients who would be injured by a ruling that the guidelines are unconstitutional. Further, the complaint states that those clients whom the plaintiffs do represent will be severely injured in the conduct of their defenses, because the uncertainty as to the guidelines' constitutionality makes it difficult for attorneys to advise clients effectively and for clients to decide how to plead and to what offense.

The plaintiffs ask the court to declare the guidelines unconstitutional and to order the Commission to send a copy of the court's judgment to all courts of the United States and to the U.S. Probation System; they also seek costs and attorneys' fees. ■

Chief Judge Wm. Terrell Hodges (M.D. Fla.) makes a point during his talk about jury instructions at the FJC seminar for newly appointed district judges in Washington, D.C., in November of 1987.

(Left to right) Judges James H. Alesia (N.D. Ill.), Richard J. Daronco (S.D.N.Y.), David S. Doty (D. Minn.), and Joseph F. Anderson, Jr. (D.S.C.) confer during the seminar.

NOTEWORTHY

Judicial immunity held applicable to judge's law clerk. The doctrine of absolute judicial immunity is available to a judge's law clerk acting within the scope of his or her duties, the District Court for the Southern District of New York has ruled. *Oliva v. Heller*, 670 F. Supp. 523 (S.D.N.Y. 1987). The court applied a "functional analysis" of the type followed in other cases construing judicial immunity and held that "law clerks are simply extensions of the judges at whose pleasure they serve," and therefore "for purposes of absolute judicial immunity, judges and their law clerks are as one," thus requiring the dismissal of plaintiff's case.

Judicial immunity bars *Bivens* actions. The doctrine of judicial immunity extends to cases alleging "direct constitutional torts" under *Bivens v. Six Unknown Named Agents*, the Ninth Circuit has held. *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987). Mullis sued numerous bankruptcy court judges and clerks, seeking monetary damages and declaratory and injunctive relief following a bankruptcy judge's denial of his motion to withdraw his bankruptcy petition and dismiss the bankruptcy case. The bankruptcy clerks allegedly filed the bankruptcy petition without providing information requested by the petitioner's wife as to which chapter of the *Bankruptcy Code* would permit the petitioner subsequently to withdraw or dismiss his petition. The clerks also allegedly did not state that they could not give legal advice, but took the petition, saying it would be filed under "the appropriate chapter."

The Ninth Circuit held the bankruptcy judges absolutely immune from a suit for damages, and held the clerks and the bankruptcy trustee immune from damages under the doctrine of absolute quasi-judicial immunity. As for Mullis's claim that prospective equitable relief was available under *Pulliam v. Allen*, the Ninth Circuit noted that a plaintiff seeking an award of equitable relief under *Pulliam* must show that he or she has an inadequate remedy at law and a serious risk of irreparable harm. "Where a federal official meets the prerequisites for judicial or quasi-judicial immunity from damages, there will invariably be an adequate remedy through either ordinary appeals or by extraordinary writ," the Ninth Circuit reasoned, holding that the *Pulliam* exception to judicial immunity is not available in a *Bivens* action.

State courts may not hear claims that filing of bankruptcy petition constitutes abuse of process. The Ninth Circuit has held that a state court has no power to decide that filing a bankruptcy petition constitutes abuse of process. *Gonzales v. Parks*, No. 86-594 (9th Cir. Oct. 20, 1987). A creditor filed a suit in a California state court claiming that the debtors' filing of a Chapter 11 bankruptcy petition constituted an abuse of process because it was used solely to delay a foreclosure sale following the debtors' default on an obligation. A default judgment against the debtors was entered in the state court. The debtors sought relief from the judgment and won a summary judgment from the bankruptcy court that the state court judgment was void as violative of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a). The district court affirmed and the court of appeals upheld the decision. Congress's grant to the federal courts of exclusive jurisdiction over bankruptcy matters includes the implied power to protect that grant by collaterally attacking state court judgments that would threaten the uniformity of federal bankruptcy law, the appeals courts said.

En banc opinion of 1st Cir. upholds district court rule on subpoenas of lawyers. The U.S. Court of Appeals for the the First Circuit, sitting en banc, has affirmed the district court's authority to require by local rule of court that federal prosecutors obtain judicial approval before they subpoena lawyers to testify concerning their clients before grand juries. *U.S. v. Klubock*, No. 86-1413 (1st Cir. Oct. 30, 1987).

A divided panel of the First Circuit had previously affirmed the validity of the local rule (see *The Third Branch*,

See NOTEWORTHY, page 6

PERSONNEL

Nominations

Supreme Court of the U.S.

Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Nov. 24

District Judges

David A. Ezra, U.S. District Judge, D. Hawaii, Nov. 18

Kenneth M. Hoyt, U.S. District Judge, S.D. Tex., Nov. 24

Robert Roberto, Jr., U.S. District Judge, E.D.N.Y., Nov. 24

Rudy Lozano, U.S. District Judge, N.D. Ind., Dec. 4

Confirmations

Sam R. Cummings, U.S. District Judge, N.D. Tex., Dec. 8

Robert S. Gawthrop III, U.S. District Judge, E.D. Pa., Dec. 8

Jerome Turner, U.S. District Judge, W.D. Tenn., Dec. 8

Franklin S. Van Antwerpen, U.S. District Judge, E.D. Pa., Dec. 8

Dean Whipple, U.S. District Judge, W.D. Mo., Dec. 8

Alfred M. Wolin, U.S. District Judge, D.N.J., Dec. 8

Bankruptcy Judges Appointments

Stephen J. Covey, U.S. Bankruptcy Judge, N.D. Okla., Nov. 2

Henry H. Dickinson, U.S. Bankruptcy Judge, W.D. Ky., Nov. 16

Magistrates (Full-time) Appointments

Nancy Fiora, U.S. Magistrate, D. Ariz., Dec. 1

John T. Reid, U.S. Magistrate, D. Kan., Dec. 1

Christine A. Noland, U.S. Magistrate, M.D. La., Dec. 4

Robert Jake Johnston, U.S. Magistrate, D. Nev., Dec. 14

NOTEWORTHY, from page 5

July 1987, at 3). The District Court of Massachusetts had adopted as one of its own local rules an amendment to the state ethics code promulgated by the Massachusetts Supreme Judicial Court. Federal prosecutors had brought suit challenging the district court rule as conflicting with Fed. R. Crim. P. 17 and the Supremacy Clause of the Constitution.

Costs of incarceration and supervision. The sentencing guidelines provide at § 5E4.2(i) that, in addition to the fine called for in § 5E4.2(c), the court shall impose a fine that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. The AO has provided the following figures to chief probation officers to be used for this purpose: The average per capita cost in a Bureau of Prisons facility for FY88 is expected to be $40.14 daily, $1,221 monthly, and $14,652 yearly for incarcerated offenders; and $30.24 daily, $920 monthly, and $11,038 yearly for offenders in halfway houses. Supervision costs are $2.74 daily, $83.33 monthly, and $1,000 yearly.

Deaf juror qualified under Jury Selection and Service Act. A deaf juror for whom a qualified interpreter translated speech into sign language during voir dire, trial, and jury deliberations was a qualified juror, the Tenth Cir. has held. *U.S. v. Dempsey*, 830 F.2d 1094 (10th Cir. 1987).

American Judicature Society receives grant for education on judicial ethics. The Henry Luce Foundation has provided $100,000 to the American Judicature Society, which will be used to conduct three regional forums on judicial ethics over the next two years. The three-day seminars for groups of 20 judges from each of three regions will be taught by judicial conduct commission members, judges, and law professors.

Study of attorney discipline system urged. The National Organization of Bar Counsel (NOBC), in a committee report entitled "Nationwide Evaluation of Disciplinary Systems," is calling for a national study of the attorney discipline system, citing "significant dissatisfaction" among members of the bar and the general public with how disciplinary matters are handled. The NOBC, most members of which are state officials who serve as counsel to bar associations, contends that public confidence in the legal profession will be eroded unless steps are taken to correct perceived inadequacies in the system for attorney discipline. The organization notes such problems as inadequate (and in some cases nonexistent) procedures for reporting ethical violations, and cites as especially important the need for reciprocal arrangements for exchange of information on disciplinary actions, including expungement of records of dismissed grievances.

The NOBC's challenge may prompt action from the states. Already the Virginia legislature has mandated that as of July 1, 1988, all those newly admitted to the state's bar will be required to take a two-day course on ethics.

A 1987 survey on lawyer discipline systems published by the ABA Center for Professional Responsibility indicated that one complaint alleging lawyer misconduct is filed for every 11 dues-paying lawyers in the United States; however, only one in every 13 complaints results in a finding of probable cause to believe the lawyer engaged in misconduct. ■

Positions Available

Clerk of Court, 6th Cir. Salary to $72,500, commensurate with education and experience. Minimum requirements include 10 years' progressively responsible managerial or administrative experience (law practice may be substituted for experience; degrees in public, business or judicial administration, or law may be partially substituted for the required experience). Bachelor's, postgraduate, or law degrees desirable. Send resume with cover letter by Feb. 10, 1987, to James A. Higgins, Circuit Executive, 503 U.S. Courthouse, Cincinnati, OH 45202. Position will remain open until filled.

Judge, U.S. Bankruptcy Court, M.D. Fla. (Orlando). New position; salary $72,500. 14-year appointment. Persons with law degrees whose character, experience, ability, and impartiality qualify them to serve in the federal judiciary may request application from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, 56 Forsyth St., NW, Atlanta, GA 30303. Application deadline: Jan. 15, 1988.

Clerk, U.S. Bankruptcy Court, N.D. Ala. (Birmingham). Salary to $72,500. Requires a minimum of 10 years' progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility; must have experience in personnel management; experience with computer systems helpful. The active practice of law may be substituted for the management or administrative experience requirements. Undergraduate, postgraduate, and law degrees may be substituted for up to 3, 1, or 2 years, respectively, of the required general experience. Suggested closing date Jan. 25, 1988, but open until filled. Submit in quadruplicate a resume or SF171 to Chief Judge George S. Wright, U.S. Bankruptcy Court, Northern District of Alabama, P.O. Box 3226, Tuscaloosa, AL 35403.

Chief Law Librarian, 3d Cir. Salary $32,567–45,763 (or, if can qualify, to $59,488). Under direction of circuit executive and policies established by a committee of system users, manages all aspects of law libraries created under 28 U.S.C. § 713(a) which serve the federal appellate and trial courts of the circuit. Formulates budget, administers, supervises law librarians, support staff, evaluates library programs, does long-range planning. Requirements: master's degree in library or information science, thorough knowledge of law library management concepts, and proven management and administrative skills. Law degree preferred. Submit resume by Jan. 29, 1988, to Circuit Executive, 21613 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106.

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The publications listed below may be of interest to aders. Only those preceded by a checkmark are ailable from the Center. When ordering copies, ease refer to the document's author and title or her description. Requests should be in writing, companied by a self-addressed mailing label, eferably franked (but do not send an envelope), d addressed to Federal Judicial Center, formation Services, 1520 H Street, N.W., ashington, DC 20005.

Becker, Edward R., Patrick E. igginbotham, and William K. Slate "Why the Numbers Don't Add Up." *B.A. J.*, Oct. 1, 1987, p. 83.

Block, Michael K., and William M. nodes. "The Impact of the Federal ntencing Guidelines." *NIJ Reports*, pt./Oct. 1987, at 2.

Judicial Sabbaticals Subject Of New FJC Paper

A new staff paper, *Judicial Sabbaticals*, is available from the Center. The author, Professor Ira Robbins of American University's Washington College of Law, examines the use of sabbaticals in business, industry, law firms, and government, as well as in academic and religious institutions. He reviews the limited ways in which sabbaticals have been applied to the judiciary and discusses the desirability of extending their use. Professor Robbins finds that sabbaticals have been an effective way of reducing "burn-out" for those, like judges, in high-stress occupations, and he concludes that they can be a valuable tool within the judiciary to improve efficiency and productivity, improve morale, attract highly qualified individuals to the bench, decrease attrition, and put judges more in touch with the communities whose interest they serve.

Copies of the paper can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed mailing label. Do not include an envelope.

Center for Public Resources. *ADR and the Courts: A Manual for Judges and Lawyers*. Butterworth, 1987.

Coffin, Frank M. "A Genealogy of Founders." 39 *University of Maine L. Rev.* 247 (1987).

Connelly, Sean. "Congressional Authority to Expand the Class of Persons with Standing to Seek Judicial Review of Agency Rulemaking." 39 *Administrative L. Rev.* 139 (1987).

Edwards, Harry T. "The Changing Notion of 'Our Federalism'." 33 *Wayne L. Rev.* 1015 (1987).

Federal Offenders in the United States Courts 1985. Administrative Office of the U.S. Courts.

Gilkey, Roderick. "Alternative Dispute Resolution: Hazardous or Helpful?" 36 *Emory L.J.* 575 (1987).

Godbold, John C. "*Pro Bono* Representation of Death Sentenced Inmates." 42 *Record of the Association of the Bar of the City of New York* 859 (1987).

Henry, Brian R. "The Criminal Defense Counsel's Concise Guide to Prejudicial Communication During Criminal Jury Trials." 23 *Criminal Law Bulletin* 413 (1987).

Kaufman, Irving R. "The Public's Right to Speedier Justice." *New York Times*, Oct. 16, 1987, p. A39.

Kay, Susan L. "The Implications of Prison Privatization on the Conduct of Prison Litigation Under 42 U.S.C. Section 1983." 40 *Vanderbilt L. Rev.* 867 (1987).

Landes, William M., and Richard A. Posner. *The Economic Structure of Tort Law*. Harvard University Press, 1987.

Mahoney, Barry. "Attacking Problems of Delay in Urban Trial Courts: A Progress Report." 11 *State Court Journal* No. 3 at 4 (Summer 1987).

Markey, Howard T. "A Judicial Need for the 80's: Schooling in Judicial Ethics." 66 *Nebraska L. Rev.* 417 (1987).

Markey, Howard T. "On Simplifying Patent Trials." 116 *F.R.D.* 369 (1987).

Perazich, John. "Judicial Burnout: Is It Searing Through D.C.?" 1 *The Washington Lawyer*, No. 7 (Sept./Oct. 1987) at 29.

Perception and Reality: Survey on Selected Provisions of the 1984 Amendments to the Bankruptcy Code. American Bankruptcy Institute, 1987.

Poulos, John W. "The Supreme Court, Capital Punishment, and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment." 28 *Arizona L. Rev.* 143 (1986).

✔Pregerson, Harry. "The Seven Sins of Appellate Brief Writing and Other Transgressions." 34 *UCLA L. Rev.* 431 (1987).

Rehnquist, William H. "A Comment on the Instruction of Constitutional Law." 14 *Pepperdine L. Rev.* 563 (1987).

Rehnquist, William H. "The State of the Legal Profession." *New York State Bar J.*, Oct. 1987, at 18.

Robbins, Ira P. "Privatization of Corrections: Defining the Issues." 40 *Vanderbilt L. Rev.* 813 (1987).

Ross, William G. "The Function, Roles, and Duties of the Senate in the

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Supreme Court Appointment Process." 28 *William & Mary L. Rev.* 633 (1987).

Selvin, Jolly, and Larry Picus. *The Debate Over Jury Performance: Observations from a Recent Asbestos Case.* Rand Corporation, Institute for Civil Justice, 1987.

"Sentencing Commission Chairman Wilkins Answers Questions on the Guidelines." *NIJ Reports*, Sept./Oct. 1987, at 7.

Shanley, Michael G., and Mark A. Peterson. *Posttrial Adjustments to Jury Awards.* Rand Corporation, Institute for Civil Justice, 1987.

Solovy, Jerold S., and Charles M. Shaffer. *Rule 11 and Other Sanctions: New Issues in Federal Litigation.* Practicing Law Institute, 1987.

Stevens, John Paul. Address. 9 *University of Hawaii L. Rev.* 1 (1987).

Terrell, Timothy P. "Rights and Wrongs in the Rush to Repose: On the Jurisprudential Dangers of Alternative Dispute Resolution." 36 *Emory L.J.* 541 (1987).

Yamamoto, Eric K. "Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation." 9 *University of Hawaii L. Rev.* 395 (1987).

LEGISLATION, from page 2

ployees who had access to the property under investigation and who the employer had reasonable suspicion to believe were involved in the incident. S. 1904 would establish a private cause of action in employees and prospective employees for violations of the act. The House passed a bill that would limit the use of lie detectors, H.R. 1212, in November 1987.

- Rep. Don Sundquist (R-Tenn.) introduced a joint resolution, H.J. Res. 400, to amend the Constitution to provide that "notwithstanding section 2 of Article III . . . unless the President nominates and the Senate consents to the continuance in office of a judge . . . that judge may not hold office for more than ten years after he took office, after the Senate last consented to his continuance in office, or after the ratification of this article, whichever last occurs." The proposed constitutional amendment would not apply to judges who have retired from active judicial service. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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NUMBER 2
FEBRUARY 1988

Congress Cuts Judiciary's Fund Request by Five Percent, But Available Funds Greater Than in FY87

The FY88 appropriation for the judicial branch of government is $1,329,934,000. After certain "carryover" funds are added back, and the availability of certain fees is considered, the judiciary will be approximately $50 million short in operating funds from its FY88 requirement. This represents about a 5 percent cut in the judiciary's request but also represents an increase in available funding over FY87 levels of nearly $126 million.

The appropriation includes $17,357,000 for the Supreme Court; $1,250,535,000 for the courts of appeals, district courts, and other services; $31,167,000 for the AO; $10,548,000 for the FJC; and separate amounts for the U.S. Court of Appeals for the Federal Circuit, U.S. Court of International Trade, and U.S. Sentencing Commission. The appropriation bill passed in the Senate was approximately $50 million short of the judiciary's request, and the bill passed in the House was approximately $120 million short. As a result of the budget summit between the executive and legislative branches, a $2.6 billion reduction was to be spread among all domestic appropriations. This required that approximately $50 million more had to be cut from the judiciary appropriation as its pro rata share of the reduction after the Senate and House had reached initial agreement on the differences in their bills.

The appropriations resolution includes a provision that fixes the salaries of bankruptcy judges and sets the ceiling on the salaries of magistrates at 92% of the salary of a district judge. The provision is effective Oct. 1, 1988. The enactment of the permanent salary-setting mechanism was endorsed by the Judicial Conference of the United States and follows efforts by the Committees on the Administration of the Bankruptcy and Magistrates Systems, the former Court Administration Committee, and the national associations representing the bankruptcy judges and magistrates. ■

U.S. Sentencing Commission Adopts Technical Amendments; Local Court Rules in Effect

The United States Sentencing Commission in December and early January adopted a number of amendments to its sentencing guidelines and official commentary, as distributed to the courts in April and October 1987. The Commission has mailed the amendments to recipients of its Guidelines Manual, along with illustrations developed by the Commission staff on the operation of the multiple count and criminal history sentencing guidelines.

The amendments took effect on Jan. 15, 1988. They were adopted pursuant to the Commission's temporary authority for "emergency guidelines promulgation." Commission Chairman William W. Wilkins, Jr., said the purpose of the amendments was "to clarify and to make technical and clerical corrections to the guidelines, and to make them conform to recently-enacted legislation."

Meanwhile, district courts around the country are adopting local rules of court and standing orders detailing procedures under guideline sentencing. Many of the rules are variations of the model local rule developed last fall by the Judicial Conference Probation Committee, and thus typically extend the 10-day statutory minimum

See GUIDELINES, page 3

Chief Justice's Year End Report Reviews 1987 Judicial Developments

The Chief Justice in his 1987 Year End Report described the revised committee structure of the Judicial Conference of the United States, urged the swift passage of the judgeship bill supported by the Conference, again favored the establishment of an intercircuit tribunal or national court of appeals, and called for "serious consideration" of the elimination or curtailment of diversity jurisdiction.

The Chief Justice reviewed the work of the Special Committee to Study the Judicial Conference and the adoption of recommendations that resulted in the restructuring of the Conference's committee structure, including the creation of new committees and the dissolution of five old

See YEAR END REPORT, page 6

Inside . . .

Court Technology Conference set for April p.2
District Court (D.C.) rule on sentencing p.2
FJC Summer Program for Judges p.6

National Conference on Court Technology to be Held in Denver

The National Center for State Courts and its Institute for Court Management, the FJC, and the AO are cosponsors with more than 20 other organizations of the second National Conference on Court Technology, to be held Apr. 24-27 in Denver.

Over 60 speakers and presenters will describe and explain specific aspects of technology used by courts, and companies will exhibit their products and services. It is expected that more than 1,000 persons will attend.

Sessions will be devoted to such topics as case management; management of juries, records, and finances; court automation; how computers can support judges; commercial software; and court reporting. More than 55 sessions in 16 topical areas will be presented at least twice during the conference. It is anticipated that each attendee will be able to attend 10 to 15 program sessions.

The deadline for early registration is Feb. 15, 1988; for telephone registration, Apr. 1, 1988; and for mail-in registration, Apr. 15, 1988. The cost ranges from $255 for members of sponsoring organizations (if paid before Feb. 15), to $325 for registrations postmarked after Apr. 15 or completed on-site. Registration forms are available from the Institute for Court Management, 1331 17th St., Suite 402, Denver, CO 80202 (tel. (303) 293-3063). ■

THE THIRD BRANCH

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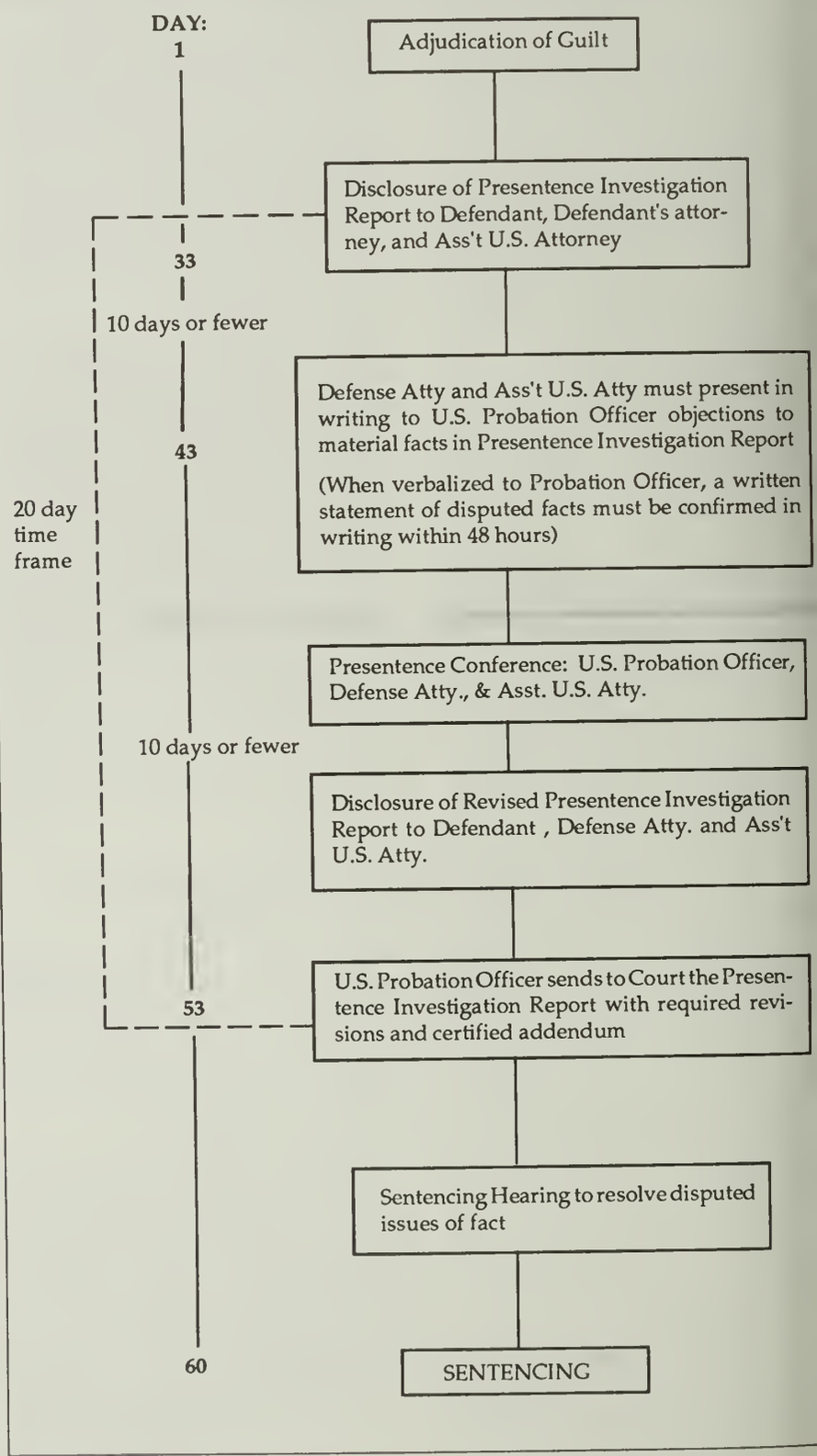
Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

February 1988

OUTLINE OF LOCAL RULE 311
U.S. District Court for the District of Columbia



Judge Charles R. Richey (D.D.C.) discusses application of the guidelines during the court-sponsored program for the D.C. bar.

CALENDAR

Feb. 4 Judicial Conference Committee on Rules of Practice and Procedure
Feb. 8-12 Orientation Seminar for New Probation/Pretrial Officers
Feb. 13-15 Workshop for Court Interpreters
Feb. 17 Executive Committee of the Judicial Conference
Feb. 17-19 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits
Feb. 21-26 Seminar for Newly Appointed Bankruptcy Judges
Feb. 22-24 Metro District Court Clerks and District Court Executives
Feb. 29-Mar. 3 Video Orientation Seminar for Newly Appointed District Judges
Feb. 29-Mar. 4 Orientation Seminar for New Probation/Pretrial Officers
Mar. 15-16 Judicial Conference of the United States

1987 Statistics on Grand and Petit Juror Service Released by Administrative Office

The AO has published *1987 Grand and Petit Juror Service in United States District Courts*. According to the report, the number of grand juries serving last year—787—was virtually the same as in 1986—792—but the number of sessions convened dropped from 11,364 in 1986 to 11,011 in 1987, and the average number of jurors per session dropped from 19.7 to 19.6. In 1987, 24,090 cases commenced by indictment, involving 38,322 defendants. S.D.N.Y., E.D.N.Y., S.D. Fla., D. Mass., and C.D. Cal. accounted for 29 percent of all the sessions convened during 1987.

The statistics on petit juror usage continued a five-year upward trend, with the number of jury trial days rising six percent from 41,945 in 1986 to 44,511 in 1987. Civil trial days rose 12 percent and now account for 57 percent of the total. The total number of petit juror days rose by 4 percent to 732,039. Overall, 31 percent of the jurors present for jury selection were selected while another 37 percent were challenged. Slightly more than 32 percent were not selected or challenged, an improvement of 2 percentage points over last year. During 1987, a total of 56 districts improved (i.e., reduced) their percentage of jurors in the "not selected, serving, or challenged" category. In an effort to reduce the number of jurors in this category, many courts have enacted local rules allowing the assessment of juror costs to parties who cancel a jury trial at the last minute. Such a rule discourages last-minute settlements and results in fewer unused panels. In 1987, 47 districts assessed juror costs on at least one occasion.■

GUIDELINES, from page 1

for disclosure of the presentence report prior to sentencing. The period for such disclosure under the rules generally ranges from 20 to 30 days prior to the date set for sentencing. Typical of these rules is local rule 311 of the District Court for the District of Columbia. (A chart showing the time frames applicable under that court's rule is reproduced on page 2.)

Guidelines education programs continue. Several courts, having completed initial orientation programs for judges, probation officers, and other personnel of the district, are now presenting programs for both the trial and appellate bars. For example, the Eastern District of Pennsylvania, in conjunction with the Federal Courts Committee of the Philadelphia Bar Association, cosponsored a program for trial attorneys, and the Eastern District of New York sponsored a similar program. The U.S. District Court and the U.S. Court of Appeals for the District of Columbia presented a program for panel attorneys and members of the bar of both courts. That program included a mock sentencing hearing presided over by Judge Charles R. Richey (D.D.C.), in which prosecuting and defense attorneys examined the probation officer who had prepared the presentence report. The seminar also provided occasion to discuss the proposed court of appeals rule for handling guidelines sentences. ■

Judge Abner J. Mikva (D.C. Cir.) at the D.C. courts' recent program on the guidelines.

Debt Collection, Habeas Corpus, Product Liability Measures on Agenda for Congress's Second Session

The following legislative items are of interest to the judiciary.

• Senators Strom Thurmond (R-S.C.), Joseph Biden (D-Del.), and Charles E. Grassley (R-Iowa) have introduced S. 1961, to enhance the remedies available to the United States for collection of debts owed to the federal government. The measure, which would create a comprehensive statutory scheme for the collection of federal debt, represents "a collaborative effort of the 94 U.S. Attorneys across this country who perform the vast majority of debt collection litigation on behalf of the United States," Sen. Thurmond noted. In Sen. Grassley's words, "Under current law, debts owed the Federal Government must be collected under a patchwork quilt of State laws where the debtor is found." Debtors can exempt more property from execution in some states than in others. The bill's sponsors say this results in inequitable and inconsistent treatment of federal debtors and impedes the effective recovery of debts owed the government (estimated at $68 billion).

• Sen. Thurmond introduced, at the request of the Reagan administration, the Criminal Justice Reform Act of 1987, S. 1970, containing titles addressing the exclusionary rule, habeas corpus, and the death penalty. Title I of the bill would codify the Supreme Court's holding in *U.S. v. Leon* that evidence obtained pursuant to a warrant that is later found to be defective will not be excluded if in executing the search the officer exhibited an objectively reasonable belief that the search was in conformity with the Fourth Amendment. The bill would also extend this exception to warrantless searches.

The habeas corpus provisions are similar to an earlier habeas corpus measure Sen. Thurmond had introduced (see *The Third Branch*, April 1987, at 9).

The death penalty provisions would provide procedures to permit the death penalty for certain federal offenses. Although various provisions of the U.S. Code by their terms authorize the death sentence for homicide, treason, and espionage, the death penalty has not been imposable under those statutes in light of procedural requirements set by subsequent

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Positions Available

Clerk of Court, D. Mass. Salary $63,135-72,500. Previous announcement of position as Clerk-Designate revised to announce position as Clerk, to commence serving upon selection or as soon as possible. Open until filled, but filing by Feb. 15, 1988, preferred. Previous applicants will be considered without reapplication. Requirements: Bachelor's degree, minimum 10 years' progressively responsible administrative experience in public service or business, including a minimum 3 years in position of substantial management responsibility. To apply, send letter with resume to Hon. Frank H. Freedman, Chief Judge, U.S. District Court, U.S. Court House, Post Office Square, Boston MA 02109. Attn: Ms. Lillian Di Blasi, Room 306.

Ass't Circuit Executive for Communications and Liaison, 9th Cir. Salary $33,218-60,683. Open immediately and until filled. Serves as public information officer, secretary to Executive Committee of circuit; plans and coordinates annual meeting for circuit judicial conference. Requirements: Bachelor's degree (advanced degree in law or court management preferred); 4 years' general administrative experience (specialized experience in press/bar liaison, publications, meeting management preferred). Travel required. Send letter, resume, salary history, and writing samples to Terry Nafisi, Ass't Circuit Exec. for Personnel & Training, U.S. Court of Appeals, P.O. Box 42068, San Francisco, CA 94142-2068.

Senior Civil Motions Attorney, 9th Cir. Salary $38,727-45,763; 2- to 5-year appointment. Legal and supervisory experience required; familiarity with federal practice preferred. Send resume, list of references, and short analytical writing sample to Dinah L. Shelton, Director, Office of Staff Attorneys, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

CIRCUIT JUDGES

Nominations

David M. Ebel, U.S. Circuit Judge, 10th Cir., Dec. 18

Emmett R. Cox, U.S. Circuit Judge, 11th Cir., Dec. 19

Paul R. Michel, U.S. Circuit Judge, Fed. Cir., Dec. 19

Confirmations

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., Dec. 19

Appointments

William D. Hutchinson, U.S. Circuit Judge, 3d Cir., Oct. 19

Clarence A. Beam, U.S. Circuit Judge, 8th Cir., Nov. 9

R. Kenton Musgrave, Judge, U.S. Court of International Trade, Nov. 13

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., Jan. 7

Deaths

Carl McGowan, U.S. Circuit Judge, D.C. Cir., Dec. 21

DISTRICT JUDGES

Nominations

Jack T. Camp, Jr., U.S. District Judge, N.D. Ga., Dec. 18

Lowell A. Reed, U.S. District Judge, E.D. Pa., Dec.18

Alfred C. Schmutzer, Jr., U.S. District Judge, E.D. Tenn., Dec. 18

Vaughn R. Walker, U.S. District Judge, N.D. Cal., Dec. 18

Kimba M. Wood, U.S. District Judge, S.D.N.Y., Dec. 18

Stephen M. Reasoner, U.S. District Judge, E.D. Ark., Dec. 19

Howard E. Levitt, U.S. District Judge, E.D.N.Y., Dec. 22

Confirmations

Kenneth Conboy, U.S. District Judge, S.D.N.Y., Dec. 19

Rodney S. Webb, U.S. District Judge, D.N.D., Dec. 19

Appointments

David G. Larimer, U.S. District Judge, W.D.N.Y., Nov. 8

James A. Parker, U.S. District Judge, D.N.M., Nov. 13

Royce C. Lamberth, U.S. District Judge

See PERSONNEL, page

NOTEWORTHY

Federal courts in New York seek advice n assisting unrepresented litigants. A ommittee representing the four federal stricts in the State of New York and the cond Circuit Court of Appeals is consid- ing ways to improve the administration lawsuits in which one or more parties do t have assistance of counsel. Pro se cases nstitute approximately 15 percent of the ,000 federal civil cases filed in the federal strict courts in New York each year. hile each of the four trial courts and the cond Circuit Court of Appeals have es- blished a small legal office to assist pro se igants, a recent report of the New York ate Bar Association indicated that the represented—usually the poor and often isoners—sometimes have not been able obtain an adequate or expeditious hear- g. Many of the pro se cases are filed by isoners under civil rights laws, attacking nditions of confinement. Because these e generally poorly drafted, are often illeg- e, and are sometimes duplicative, they esent difficult problems to the courts. her prisoner cases are habeas corpus titions attacking the conviction itself. In dition, and especially in New York City, ere are many pro se civil suits filed by rsons appealing Social Security determi- tions and by persons with trademark or tent claims.

Among the possible solutions under nsideration by the committee are:

- publicizing a "scorecard" of law firms d attorneys who have been especially lpful and effective in assisting unrepre- nted litigants (and perhaps those who ve not);
- establishing a computer hook-up ong the four district courts, to help iden- repetitive or frivolous litigation;
- obtaining certification of New York's son grievance mechanisms under 42 .C. § 1997(e);
- requiring lawyers to take a minimum mber of pro se cases as a condition of ntinuing membership in the bar of a dis- t court;
- recommending statewide adoption of a .N.Y. rule that requires prisoners to pay artial filing fee based on their prison cash ount (outside N.D.N.Y., the fee is gener- waived entirely for prisoners);
- improving the information and forms vided to pro se litigants;

See NOTEWORTHY, page 8

Chief Probation and Pretrial Services Officers Attend FJC Leadership Seminar

A three-day leadership seminar for 17 new chief probation and pretrial services officers was held at the FJC in December 1987. The seminar helped the new chiefs to identify the ingredients of leadership and different leadership styles, to find ways to diagnose their districts' various problems, needs, and strengths, and to establish a dialogue and ongoing support system among themselves.

The faculty for the seminar consisted of David Leathery, Chief, Probation and Pretrial Programs of the FJC; John Fagan, Chief of Staff of the Lieutenant Governor's Offices of the State of Colorado; and Robert "Bo" Ault, Deputy Chief U.S. Probation Officer of the Eastern District of Virginia. In addition to lectures and discussions, the seminar included small team sessions, in which participants analyzed problem situations, identified management tools for use in various situations, and planned application of the techniques presented.

The AO provided the new chief probation and pretrial officers with a two-day orientation program during their stay in Washington. ■

(Left to right) Chief Probation Officer William R. Sayes (W.D. La.), Chief Pretrial Services Officer R. James Behm(E.D. Mo.), and Chief Probation Officer Robert L. Brent (W.D. Mich.) during the Federal Judicial Center seminar held in December 1987 in Washington, D.C.

Eleventh Circuit Upholds House Committee's Access To Grand Jury Materials in Hastings Case

The Eleventh Circuit has affirmed a district court's order that the House Judiciary Committee was entitled to access to grand jury materials to use in the committee's impeachment inquiry in the case of Judge Alcee Hastings (S.D. Fla.). *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1* (11th Cir. Nov. 24, 1987). Judge Hastings had argued that disclosure created the potential for abuse of power by making the executive branch, and perhaps the judicial branch, an arm of the legislative branch in the impeachment process.

The appeals court stated that under a proper conception of separation of powers, principles of comity require a degree of cooperation between the legislative and judicial branches, and that "the grand jury as an institution has one foot in the judicial branch and the other in the executive," necessitating "a high degree of cooperation . . . if the system is to function."

The Judicial Conference certified to the House in March of 1987 its determination that consideration of the impeachment of Judge Hastings may be warranted (see *The Third Branch*, April 1987, at 5 and November 1987, at 9). ■

FJC Summer Program for Judges

Budget reductions preclude a 1988 summer judicial seminar such as those held in recent years at the Universities of Wisconsin and California.

Depending on the outcome of subsequent budget action, the Center may be able to fund a small number of judges at the Harvard Law School's Summer Program of Instruction for Lawyers. The 1988 program begins June 12 and ends June 25. Many of the courses last only one week, and if there is Center support, such support may be restricted to one week.

Article III judges who wish to be considered for support should so indicate by letter to Russell Wheeler, Director of Special Educational Services at the Center. Letters should be received by Apr. 18.

Selection will be by random drawing if applications exceed available funds. The Center may not know whether funds will be available until well into the spring, perhaps as late as May or June.

YEAR END REPORT, from page 1

committees, some of whose functions were consolidated into existing or newly created committees. The restructuring provides "greater opportunity for conference committee service than ever before," the Chief Justice said, pointing out that 99 of the 205 Article III judges now serving on Conference committees are new appointees, and that nearly twice as many bankruptcy judges and magistrates are represented on conference committees as were previously represented. He noted the strengthening of the Conference's Executive Committee, chaired by Chief Judge Wilfred Feinberg (2d Cir.) and the formation of the Legislative Liaison Group, which will work closely with the Executive Committee in monitoring legislation. The group, chaired by Chief Judge Charles Clark (5th Cir.), will alert the Executive Committee to act between Conference sessions to ensure that the views of the Conference are made known to Congress in a timely and effective manner.

The report noted AO Director L. Ralph Mecham's efforts to provide greater service to the judiciary, including initiatives to meet the judiciary's space and facilities requirements, to promote automation, and to improve commmunications with the legislative branch and within the judicial branch.

During 1987, the report said, the Supreme Court acted on 4,340 cases, the courts of appeals on 36,010 cases, and the district courts on 279,087 cases (238,000 civil and 41,087 criminal). The report saw a likelihood that the workload of the courts would become even heavier, "not due to an influx of new cases but rather to a need to devote more judicial time to the existing volume of criminal cases," as district judges, magistrates, and probation officers adapt to the new system of guideline sentencing and given that "appellate review of sentencing has now become a reality."

The Chief Justice pointed to the presidential recommendation of pay raises for the federal judiciary, which went into effect on Feb. 5, 1987, and stated that while the judiciary no doubt welcomes this action, "a wide gap remains between federal judicial salaries and the income of established and highly skilled members of the private bar." He reiterated his belief "that the present level of compensation for federal judges may not be high enough to attract . . . 'the first-rate talent that has always been a hallmark of the federal bench.'"

The report summarizes a number of items of interest to the judiciary that have become public law or are in the legislative pipeline for consideration in 1988. The report states that, based on meetings he has had with Rep. Robert W. Kastenmeier (D-Wis.) and Sen. Howell Heflin (D-Ala.), the Chief Justice has "high expectation for a renewed legislative response t the needs of the judiciary and for a open communications flow betwee our branches." The judiciary "shoul also be grateful for the support give the judicary by the Appropriatio Committees in the face of substanti cutbacks in the federal budget," th report says.

Observing that the judiciary "presently operating with 49 vaca cies nationally among Article judgeships, including the vacancy the Supreme Court," the Chief Justi praised "the steadfast efforts of o senior judges."

Among the legislative highlights the past year that the Chief Justi singled out were the new parity U.S. magistrates with bankrupt judges in their current retireme arrangements; $66 million in ad tional appropriations for the judicia for FY87, permitting the funding the 52 new bankruptcy judge po tions authorized in 1986 and perm ting court staffing levels to brought close to the judiciary's nee improvements to the Sentencing form Act of 1984, easing the tran tion into the new sentencing gui lines system and expanding the d aftercare program to cover psychi ric aftercare; passage of the "race the courthouse" bill; amendment the National Childhood Vaccine jury Act of 1986 to remove the pr essing of this type of claim from ticle III courts to the U.S. Clai Court; and the final continuing re lution for FY88, which included provision raising the salary of ba ruptcy judges and magistrates to percent of the rate of district judg effective Oct. 1, 1988.

The Chief Justice praised the se ices of retired Supreme Court Jus Lewis F. Powell, Jr., and retired Director A. Leo Levin, and welcom Judge John C. Godbold as "an a successor" to direct the FJC.

Copies of the Chief Justice's Y End Report are available from FJC's Information Services Office.

RSONNEL, from page 4

D.C., Nov. 16
William L. Standish, U.S. District Judge, D. Pa., Nov. 30
William L. Dwyer, U.S. District Judge, D. Wash., Dec. 1
Sam R. Cummings, U.S. District Judge, D. Tex., Dec. 11
Franklin S. Van Antwerpen, U.S. Dist t Judge, E.D. Pa., Dec. 21
Rodney S. Webb, U.S. District Judge, N.D., Dec. 23
Dean Whipple, U.S. District Judge, W.D. ., Dec. 29
Robert S. Gawthrop III, U.S. District ge, E.D. Pa., Jan. 4
Ernest C. Torres, U.S. District Judge, .I., Jan. 19
erome Turner, U.S. District Judge, W.D. n., Jan. 19

vations

ohn F. Gerry, Chief Judge, D.N.J., Oct. 1
Lucius Desha Bunton III, Chief Judge, D. Tex., Nov. 2
Lyle E. Strom, Chief Judge, D. Neb., r. 9
William C. O'Kelley, N.D. Ga., Jan. 1, 3

ignation

William S. Sessions, Chief Judge, W.D. ., Nov. 1

ior Status

Henry Bramwell, U.S. District Judge, N.Y., Oct. 1
Clarkson S. Fisher, U.S. District Judge, J., Oct. 1
amuel Conti, U.S. District Judge, N.D. , Nov. 1

ths

dward M. Curran, U.S. District Judge, C., Jan. 10
oss N. Sterling, U.S. District Judge, Tex., Jan. 14
dward Weinfeld, U.S. District Judge, N.Y., Jan. 17

GISTRATES (FULL-TIME)

ointments

oel B. Rosen, U.S. Magistrate, D.N.J., 10
ohn F. Simon, U.S. Magistrate, W.D. Dec. 15

rement

tephen W. Karr, U.S. Magistrate, W.D. ., Dec. 31

LEGISLATION, from page 4

Supreme Court decisions, except under a later statute involving a death in the course of an aircraft hijacking. A bill similar to S. 1970 has been introduced in the House as H.R. 3777 by Rep. George W. Gekas (R-Pa.) and others.

• Rep. William H. Gray III (D-Pa.) has introduced H.R. 3726, to enable federal judges to take senior status if they are 60 years of age and have at least 20 years of service. 28 U.S.C. §371(b) currently provides that a federal judge may retire from active service with election of senior status if the judge's attained age and years of service total 80, provided the judge is at least 65 years of age.

• Sen. Howell Heflin (D-Ala.) and Sen. Charles E. Grassley (R-Iowa) have introduced S. 1996, to amend district court jurisdiction with respect to certain actions involving citizens of the U.S. and foreign persons; the bill addresses problems that have arisen in international product liability suits. A similar bill has been introduced in the House as H.R. 3662 by Rep. Dan Glickman (D-Kan.).

Section one of S. 1996 provides federal district court jurisdiction and facilitates service of process in suits brought by U.S. citizens against foreign manufacturers, where the foreign citizen knew or should have known that the product would be sold or used in the U.S. The measure is required by the difficulties in asserting jurisdiction under some state "long-arm" statutes, Sen. Heflin says. Section two of the bill would amend 28 U.S.C. § 1441, the removal statute, to provide that any civil action brought in a state court by a foreign citizen or subject against a U.S. citizen for a product-related injury sustained outside of the U.S. may be removed by the defendant to the U.S. district court. This would include cases filed in the state of citizenship of one of the defendants (presently not removable). Section three of the bill addresses the problem of "forum shopping" by foreign plaintiffs. Under current law, the federal court in a diversity case applies the choice-of-law rules of the state in which it is located. Since not all states apply the rule that the law of the place of injury should govern, foreign plaintiffs seek jurisdictions that will apply more liberal tort standards than those in their own countries. S. 1996 would require federal courts to apply the law of the place of injury in all liability and damage issues in these actions.

• The "race to the courthouse" bill, H.R. 1162 (see *The Third Branch*, January 1988, at 2) was signed by the President Jan. 8, 1988, as Pub. L. 100-236. The measure provides for the random selection of the circuit to hear appeals from agency decisions in cases where appeals are filed in more than one circuit.

• Product liability law reform is being considered by committees in both the House and the Senate. The Commerce, Consumer Protection, and Competitiveness Subcommittee of the House Energy and Commerce Committee in December approved a measure based on H.R. 1115, sponsored by Rep. Bill Richardson (D-N.M.), which would set a federal product liability standard.

S. 666 was introduced last year by Sen. Robert W. Kasten, Jr. (R-Wis.), who has urged a uniform national standard of liability for product manufacturers and sellers. Sen. Kasten has termed the present system "a patchwork of product liability laws developed by state judges who have been basically legislating policy in this area for two decades." S. 666 includes uniform fault standards for product sellers, restrictions on the imposition of punitive damages, a workers' compensation offset to avoid double recoveries, reform of the doctrine of joint and several liability with respect to noneconomic damages, and an expedited settlement procedure.

Consideration of the product liability measures by the full House and

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LEGISLATION, from page 7

Senate could come in early 1988.

• Sen. Daniel P. Moynihan (D-N.Y.) has introduced S. 1934, to authorize the Architect of the Capitol to contract for the design and construction of a new office building for the federal judiciary. The legislation implements the findings of a report by the Architect of the Capitol and the Secretary of Transportation that was endorsed by Chief Justice Rehnquist. The office building would accommodate employees of the AO, the FJC, and other judicial branch support offices, and provide expansion space for retired Justices and other needs of the Supreme Court. The building, to be located near Union Station in Washington, would be built by a private developer but would become the property of the federal government after a 30-year lease period.

• The Budget Reconciliation Act of 1987 passed by Congress in December contained a subtitle called the "Vaccine Compensation Amendments of 1987," modifying the compensation and court jurisdiction provisions of the National Childhood Vaccine Injury Act of 1986. Petitions for compensation under the act are now to be filed with the United States Claims Court rather than with the district courts. Compensation for injuries and deaths associated with vaccines given prior to the effective date of the amendments will be made from a trust fund established under the Internal Revenue Code and authorized in the amount of $80 million per fiscal year for FY89 through FY92. Compensation for injuries and deaths associated with vaccines given after the effective date of the amendments will be subject to a ceiling on the number of awards; the ceiling is set at 150 awards per year for each of the four years after the effective date the amendments.

NOTEWORTHY, from page 5

•clarifying pleading requirements a the conditions under which the court m summarily dismiss frivolous claims.

The Pro Se Committee was establish because of Chief Judge Wilfred Feinber concern about the service of the bar and courts to pro se litigants. Its chairma Judge George C. Pratt (2d Cir.), and members are Chief Judge John T. Cu (W.D.N.Y.), Chief Judge Howard G. M son (N.D.N.Y.), Judge Leonard B. S (S.D.N.Y.), and Robert C. Heinema Clerk (E.D.N.Y.).

The committee seeks advice on poss steps to improve the quality of justice litigants who represent themselves an increase the efficiency with which the eral courts handle these cases. It inv attorneys, judges, and the public to sub suggestions to Hon. George C. Pratt, Ch man, Pro Se Committee, Long Isl Courthouse, Uniondale, NY 11553.

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GOVT. DOC.

Sentencing Guidelines Ruled Invalid in Two Cases in Southern District of California

The sentencing guidelines promulgated by the U.S. Sentencing Commission were ruled invalid in two recent cases in the U.S. District Court for the Southern District of California. The court in *U.S. v. Arnold* held that the placement of the Commission in the judicial branch and the inclusion of Article III judges on the Commission violate the constitutional separation of powers doctrine. *U.S. v. Arnold*, Cr. No. 87-1279-B (S.D. Cal. Feb. 18, 1988). This reasoning was adopted in an order in *U.S. v. Manley*, No. 87-1290-R-CRIM (S.D. Cal. Feb. 18, 1988). In a related development, a civil suit challenging the guidelines has been dismissed for lack of standing by the U.S. District Court for the District of Columbia. *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Comm'n*, No. 87-3181 (D.D.C. Feb. 22, 1988).

The decision in *Arnold* was on a pretrial motion in a case in which the two defendants pled not guilty. The motion was argued before seven other judges in the district, sitting in their individual capacities, who had similar issues pending in cases before them.

The court in *Arnold* found the issues ripe for decision even though the defendants might be acquitted at trial. The court found that the need for a determination was substantial and, looking beyond the two defendants before the court, "the Guidelines . . . are mathematically certain to be immediately applicable in a finite number of cases," and the public interest would be well served by a prompt resolution of the issue of the guidelines' constitutionality. Moreover, "the issues now before this court are purely legal and need no

See SENTENCING, page 6

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Judge Elmo B. Hunter (W.D. Mo.) Receives Devitt Distinguished Service to Justice Award

Judge Elmo B. Hunter (W.D. Mo.) has been selected as the recipient of the Edward J. Devitt Distinguished Service to Justice Award.

Judge Hunter was appointed to the federal bench in 1965, and served as chief judge of the Western District of Missouri in 1980. He served on the Judicial Conference Committee on Court Administration beginning in 1969, serving as chairman of its Subcommittee on Judicial Improvements from 1976 to 1978, and became the full committee's chairman in 1978.

Judge Hunter was born in Missouri and received his A.B. and J.D. degrees from the University of Missouri. Prior to his appointment as a federal judge, he was a senior assistant city counselor for Kansas City, a Missouri circuit judge, and a Missouri appellate judge.

Judge Elmo B. Hunter

He is a former chairman of the board and president of the American Judicature Society.

The Devitt award has been presented annually by West Publishing Co. since 1982 in recognition of extraordinary service to justice by a federal judge. The selection committee for this year's award consisted of Supreme Court Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Edward J. Devitt (D. Minn.). ■

Chief Justice Speaks On State–Federal Relations

Chief Justice Rehnquist spoke about relations between the Supreme Court of the United States and the state supreme courts at the midyear meeting of the Conference of Chief Justices held in Williamsburg, Va., on Jan. 27, 1988. His remarks concerned three areas of relations between state and federal courts.

He first discussed the circumstances under which the Supreme Court will review state court decisions that arguably are premised on both federal and state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983), held that in the absence of a plain statement that the holding below rested on an adequate and independent state ground, the presumption would be in favor of the Supreme Court's taking jurisdiction and deciding the case on federal constitutional grounds. The Supreme Court chose this course over other options, particularly the option of remanding the case back to the Supreme Court of Michigan with the attendant delay and inconvenience that such an approach would cause," the Chief Justice pointed out.

He disagreed with critics of *Long* who believe that the case "reflects hostility to the resurgence of interest in the development of state constitutional

See CHIEF JUSTICE, page 7

Inside . . .

Judiciary's budget request, Omnibus Court Reform bill before Congress p.2

7th Cir. Overturns Mandatory Summary Jury Trial Case . . p.3

ABA Midyear Meeting p.5

LEGISLATION

The following measures in Congress are of interest to the judiciary.

• The Senate passed S. 557, the Civil Rights Restoration Act, a bill intended to overrule the result reached in the Supreme Court's *Grove City College* case (see *The Third Branch*, May 1987, at 12).

• The Senate Judiciary Committee held an oversight hearing on the judicial selection process, with particular emphasis upon the Reagan administration's performance in nominating women and minorities as judicial appointees. Assistant Attorney General Stephen J. Markman of the Justice Department's Office of Legal Policy represented the administration at the hearing.

• The House Appropriations Committee's Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies held a hearing on FY89 appropriations under its jurisdiction. Chief Judge Charles Clark (5th Cir.), Judge Richard S. Arnold (8th Cir.), and Judge Thomas J. Meskill (2d Cir.) testified on behalf of the Judicial Conference. Judge John C. Godbold, FJC Director, and L. Ralph Mecham, AO Director, testified about their agencies' budget requests.

• The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, chaired by Senator Howell Heflin (D-Ala.), approved S. 951, a bill that would establish a Federal Courts Study Commission (see *The Third Branch*, August 1987, at 5).

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on H.R. 3152, an omnibus court reform bill (see *The Third Branch*, October 1987, at 1). Judge Abner J. Mikva (D.C. Cir.) and Judge Patrick Higginbotham (5th Cir.) testified in their individual capacities at the hearing.

• The Senate Governmental Affairs Committee held a hearing on H.R. 3400, a bill to amend the Hatch Act to permit more partisan political activity by executive branch employees. The House has previously passed H.R. 3400 (see *The Third Branch*, January 1988, at 2). Although the Hatch Act is not applicable by its terms to the judiciary, a long-standing resolution of the Judicial Conference adopted the act's intent as binding on judicial branch employees.

• Rep. Tommy F. Robinson (D-Ark introduced H.R. 3902, to specify tha in federal civil suits alleging tha overcrowded conditions in a sta penal facility violate the Eight Amendment, the plaintiff shall be r quired to prove the allegation b clear and convincing evidence.

• Rep. Hamilton Fish, Jr. (R-N.Y

See LEGISLATION, page

AO Director L. Ralph Mecham listens as Chief Judge Charles Clark (5th Cir.), Judge Richard S Arnold (8th Cir.), Chairman of the Judicial Conference Budget Committee, and Judge Thomas Meskill (2d Cir.) testify on the judiciary's FY89 budget request before a subcommittee of th House Appropriations Committee.

1988 Circuit Judicial Conferences

First Circuit	Sept. 26-28	Harwich Port, Mass.
Second Circuit	Sept. 8-11	Hershey, Pa.
Third Circuit	Sept. 18-20	Princeton, N.J.
Fourth Circuit	June 30-July 2	White Sulphur Springs, W. Va.
Fifth Circuit	Apr. 17-20	Jackson, Miss.
Sixth Circuit	July 6-9	Hot Springs, Va.
Seventh Circuit	May 8-10	Indianapolis, Ind.
Eighth Circuit	July 14-17	St. Louis, Mo.
Ninth Circuit	Aug. 16-19	Coeur d'Alene, Ida.
Tenth Circuit	July 6-8	Jackson Lake, Wyo.
Eleventh Circuit	May 1-4	Panama City, Fla.
D.C. Circuit	May 22-24	Williamsburg, Va.
Federal Circuit	May 13	Washington, D.C.

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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March 1988

Seventh Cir. Holds District Court Was Without Authority to Require Summary Jury Trial

The Seventh Circuit has held that a district court does not have the authority under Fed. R. Civ. P. 16 to require parties to submit to a mandatory nonbinding summary jury trial. *Strandell v. Jackson County*, No. 87-1559 (7th Cir. Jan. 21, 1988). In a summary jury trial, which generally lasts one day, attorneys summarize their case before a jury, which renders a nonbinding verdict. Litigants may be motivated to settle based on their estimate of how an actual jury may respond to their evidence.

The district court had estimated that trial of the plaintiff's civil rights action would last five to six weeks. Faced with a crowded docket, including a heavy criminal caseload subject to the Speedy Trial Act, the court had ordered a nonbinding summary jury trial. It based the order on a 1984 resolution of the Judicial Conference of the United States endorsing summary jury trials; on Fed. R. Civ. P. 16; on its obligations under the Speedy Trial Act; and on "the ability of a court to use its best judgment to move its crowded docket." Plaintiff's attorney claimed that a summary jury trial would require disclosure of privileged witness statements, whose production the court had refused to compel, and refused to proceed. The court held him in criminal contempt. (See *The Third Branch*, July 1987, at 4).

The Seventh Circuit vacated the contempt order, and in its recent opinion disagreed with the trial judge that rule 16(c) as amended in 1983 can be read as authorizing a mandatory summary jury trial. While agreeing that the pretrial conference under rule 16 was intended to foster settlement through the use of extrajudicial procedures, the appeals court said that the rule "was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation." The Seventh Circuit emphasized that it was not ruling on how summary jury trials may be used with the consent of the parties, nor expressing a view on the effectiveness of the technique in facilitating settlements.

Requiring a mandatory summary jury trial as a pretrial settlement device would also "affect seriously the well-established rules concerning discovery and work-product privilege," the court said. Where the Supreme Court and Congress, through the rulemaking process, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judge must conform to that balance, the court said.

Two bills introduced in Congress would expressly allow district courts to utilize summary jury trials—H.R. 473, introduced by Rep. William J. Hughes (D-N.J.), and S. 2038, introduced by Sen. Mitch McConnell (R-Ky.). Under the bills, the court could order the parties to participate in an alternative dispute resolution only upon the parties' agreement to do so, but the bills would provide sanctions for an "unreasonable refusal" to participate by either of the parties. ■

Certiorari Denied in Appeal by Judge Walter L. Nixon

The Supreme Court has denied certiorari in *Nixon v. U.S.*, No. 87-650.

Judge Walter L. Nixon, Jr. (S.D. Miss.) was convicted in 1986 of perjury before a federal grand jury, and the conviction was affirmed by the Fifth Circuit in 1987. *U.S. v. Nixon*, 816 F.2d 1022 (5th Cir. 1987). Judge Nixon's petition for rehearing and suggestion for rehearing en banc were later denied by the Fifth Circuit. Eleven of the circuit's fourteen active circuit judges recused themselves from the case. Judge Nixon had asked that the local rule requiring a majority vote of all active circuit judges in order for the case to be reheard en banc be modified in his case, but the Fifth Circuit declined to modify the rule. ■

ABA Task Force Issues Caseflow Management Report

The Lawyers Conference Task Force on Reduction of Litigation Cost and Delay of the Judicial Administration Division of the ABA has released *Caseflow Management in the Trial Court—Now and for the Future*, by Maureen Solomon and Douglas K. Somerlot. The task force was formed to implement the knowledge gained by the ABA Action Commission on Court Cost and Delay and to promote the adoption by the courts of the *Standards Relating to Court Delay Reduction*. The task force included among its members Judge Robert C. Broomfield (D. Ariz.) and Chief Judge Robert F. Peckham (N.D. Cal.), as well as state court judges, academics, and practicing attorneys. The new publication is intended to encourage the application of case management principles to the day-to-day work of lawyers and courts.

CALENDAR

Mar. 3-5 Judicial Conference Committee on the Bicentennial of the Constitution
Mar. 7-9 Seminar for Bankruptcy Chief Deputy Clerks
Mar. 13-15 Bankruptcy Case Management Workshop
Mar. 14-18 Seminar for Chief Probation/Pretrial Clerks
Mar. 14-19 Fordham Graduate Program for Probation Officers
Mar. 15-16 Judicial Conference of the United States
Mar. 21-23 Seminar for District Deputy Clerks-in-Charge
Mar. 22-25 Frontline Leadership Training of Trainers
Mar. 23-25 Workshop for Judges of the Fourth Circuit
Mar. 28-29 Conference for Metropolitan District Chief Judges
Apr. 5-8 Workshop for Docketing Supervisors
Apr. 6-8 Seminar for Magistrates of the Ninth and Tenth Circuits
Apr. 7-8 Judicial Conference Advisory Committee on Civil Rules

NOTEWORTHY

Fourth Circuit holds Virginia need not provide counsel to state habeas petitioners in death penalty cases. The Fourth Circuit has overturned a district court decision that held the Commonwealth of Virginia must provide counsel to inmates sentenced to death to assist in preparing state habeas corpus petitions challenging their convictions and sentences. *Giarratano v. Murray*, No. 87-7519 (4th Cir. Jan. 4, 1988). "Virginia fulfills its obligation under *Bounds* [*v. Smith*, 430 U.S. 817 (1977)] to provide all inmates with meaningful access to the courts, and there is no factual or legal justification for requiring a higher standard of access for death row inmates. In essence, by reading the record to support a sweeping extension of *Bounds*, the district court has, under the guise of meaningful access, established a right of counsel where none is required by the Constitution," the Fourth Circuit held. The court quoted from the Supreme Court's opinion in *Pennsylvania v. Finley*, 95 L. Ed. 2d 539 (1987), decided subsequent to the district court's decision: "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further." The appeals court found no justification for holding that the plaintiffs constitute an exception to *Finley*, nor for reading *Bounds*'s "meaningful access" to the courts to require the appointment of counsel. The Fourth Circuit upheld that part of the district court decision which held that the Commonwealth need not provide the inmates counsel to prepare federal postconviction petitions.

Virginia provides inmates with a law library and with institutional attorneys who act in an advisory capacity in preparing postconviction petitions, as well as with appointed counsel to assist in cases that require an evidentiary hearing. The Fourth Circuit disagreed with the district court's finding that the legal assistance provided by Virginia was insufficient for death row inmates.

Robert D. St. Vrain, clerk of the Eighth Circuit, speaks at a recent meeting of clerks of courts of appeals at the FJC. The courts of appeals are in the process of formulating procedures for handling appeals of guideline sentences. (At right, Robert Hoecker, Clerk, 10th Cir.)

Bankruptcy Court goes on seminar tour in E.D. Va. All four bankruptcy judges of the Eastern District of Virginia, led by Chief Judge Martin V. B. Bostetter, Jr., spoke at recent seminars in three different locations in the district. Five hundred participants attended the seminars, which were promoted under the title, "The Bankruptcy Court Comes to You." In addition to the four judges, 30 other bankruptcy court personnel participated. The seminars were sponsored by the Committee on Continuing Legal Education of the Virginia Law Foundation, in cooperation with the office of Michael M. Sheppard, Clerk of the Bankruptcy Court.

Printed materials handed out at the seminars included a detailed outline of local rules and court procedures, copies of local forms, and a copy of the new local rules of the Eastern District's Bankruptcy Court. Presentations by court personnel covered all phases of bankruptcy practice, from case filing to the procedure for obtaining information from the court on a closed case.

The seminar presentations were also used as a vehicle for training employees on the new local rules, and for further standardization of court procedures for all four bankruptcy divisions within the district.

Parole Commission conducts pilo program of monitoring parolees wit electronic sensors. The U.S. Parol Commission has begun a test progran to supervise certain federal parolees b means of electronic monitoring. Seve parolees in Miami and four in Lo Angeles entered the program in Janu ary. A total of 200 parolees will b involved when the commission evalu ates the program in 18 months.

Under the program, offenders wh do not need halfway house services wi be released from prison to the commu nity up to 180 days in advance of the parole date. Parolees will wear on the ankles electronic devices that sen signals to transmitters in the parolee home telephones. During the early re lease period, the parolees must b home at all times except for work, au thorized treatment programs, an worship services. The transmitters re lay a signal to a computer, which de tects any unauthorized absences of th parolees from their homes. If the paro ees cannot be reached, their probatio officers will personally investigate.

Electronic monitoring (see *The Thir Branch*, December 1987, at 4) costs $5-1 a day per parolee, compared with a co of $30 a day for parolees released t halfway houses.

Resolutions on Court Issues Discussed by ABA

At the ABA's midyear meeting in hiladelphia last month, the following sues of interest to the federal courts me before the house of delegates.

Evaluation of judicial performance. he ABA has adopted committee rec-nmendations amending its judicial erformance guidelines program to clude federal judges. When the pro-am was adopted in 1985 it covered ly state judges. At that time the ABA ok no position on the program's pplicability to Article III federal dges, because of existing federal leg-ation on the subject and because of e federal Code of Judicial Conduct, pproved by the Judicial Conference of e United States.

One-third of the states have adopted me or all of the ABA's program to te.

Standards for judicial education. n amendment to a previous ABA ndard was approved to further clar-that non-judges, including law pro-sors, attorneys, court administra-s, and others, "may be utilized here their expertise will contribute to als" of judicial education and train-g programs.

Subpoena of attorneys. The ABA ffirmed the principle of prior judi-l approval of subpoenas of attorneys evidence obtained as a result of the orney-client relationship. The new ommendation specifies the stan-rds the ABA believes the court ould apply in ruling on the osecutor's request for such a sub-ena.

Lawyers' Code of Professionalism. empts to draft a new Code of Profes-nalism for lawyers were delayed en suggested changes were with-wn after submission to the house of egates.

Federal habeas corpus death pen-y proceedings. This resolution ed for a series of actions aimed at nging about full implementation of provisions of the Criminal Justice t Revision of 1986 and the Criminal Justice Act (CJA) Guidelines amended in 1987, and acknowleges "the efforts of the federal judges to implement these provisions and guidelines." The resolution calls for a raise in the amounts paid court-appointed counsel in federal habeas corpus death penalty cases, in addition to waivers of the case compensation limit for investigative, expert, and other services court-appointed attorneys have found necessary in the past. The resolution also calls for changes in procedures followed to appoint attorneys to assure adequate representation (such as the appointment of the same attorneys in federal habeas corpus proceedings as were counsel for the defendants in state postconviction proceedings); preassignment screening of attorneys to assure that only trained and experienced attorneys are appointed; and the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record. To give further support for these requests the proposers called for creation of more regional centers to provide expert advice and assistance to these court-appointed counsel. The resolution also encouraged the federal courts, in implementing CJA plans, to "consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency" in the appointment of post-conviction counsel in death penalty cases. After debate and redrafting the house of delegates approved.

The Judicial Conference of the United States approved the amendments to the Guidelines in March of 1987, after having asked the chief judges in 1986 to establish task forces to develop more information on the impact of the projected death penalty cases reaching the postconviction stage in federal courts. In addition, the Judicial Conference established special alternative maximum hourly compensation rates for four federal district courts in California. (See *The Third Branch*, January 1988, at 1, 3.) The Judicial Conference at its meeting this month will further consider these and other related matters.

ABA dues. A 25 percent reduction from the regular dues was approved by the house for certain classes of members, including all full-time judges and full-time government lawyers. The new rates take effect in June. For further information and application for membership contact Ms. Suzanne Wegrzyn, Director of Membership, at (312) 988-5516, or write to the ABA at 750 N. Lake Shore Drive, Chicago, IL 60611.

Juror use and management. The ABA house of delegates did not amend standard 9(d), adopted in 1983, which relates to peremptory challenges. One amendment would have specified that the number of peremptory challenges in criminal cases "be equal for prosecution and defense where there is one defendant." Proponents said the amendments were necessary because of the Supreme Court's 1986 decision in *Batson v. Kentucky.* ■

Positions Available

District Court Executive, N.D. Ga. Salary to $72,500. Works under direction of judicial council pursuant to 28 U.S.C. § 332(e) and other statutes and rules. Must have bachelor's degree in management or related field, experience in administration or equivalent. Legal training preferred but not required. Certification pursuant to 28 U.S.C. § 332(f) prerequisite to appointment, but applications from non-certified applicants encouraged. Send resume by Apr. 1, 1988, to Ben H. Carter, District Court Executive, U.S. District Court, Northern District of Georgia, Room 2211, U.S. Courthouse, 75 Spring St., S.W., Atlanta, GA 30335.

Chief Deputy Clerk, Bankruptcy Court, D. Colo. Salary $33,218-54,907. Requirements: Bachelor's degree, minimum 6 years progressively responsible administrative experience in public or private service, including a minimum 3 years in position of substantial management responsibility. Position available June 1, 1988, or sooner. Send resume by Mar. 31 to Bradford L. Bolton, Clerk, U.S. Bankruptcy Court, 1845 Sherman, Room 400, Denver, CO 80203-1190.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

SUPREME COURT OF THE U.S.

Confirmation

Anthony M. Kennedy, Associate Justice, Feb. 3

Appointment

Anthony M. Kennedy, Associate Justice, Feb. 18

CIRCUIT JUDGES

Confirmation

Wade Brorby, U.S. Circuit Judge, 10th Cir., Feb. 16

Appointment

Robert E. Cowen, U.S. Circuit Judge, 3d Cir., Nov. 15

DISTRICT JUDGES

Nominations

Bernard A. Friedman, U.S. District Judge, E.D. Mich., Feb. 2

Emilio M. Garza, U.S. District Judge, W.D. Tex., Feb. 2

George M. Marovich, U.S. District Judge, N.D. Ill., Feb. 2

Thomas S. Zilly, U.S. District Judge, W.D. Wash., Feb. 16

Donald E. Abram, U.S. District Judge, D. Colo., Feb. 19

Shannon T. Mason, Jr., U.S. District Judge, E.D. Va., Feb. 22

Nomination Withdrawn

Robert N. Miller, U.S. District Judge, D. Colo., Feb. 2

Confirmations

Richard J. Arcara, U.S. District Judge, W.D.N.Y., Feb. 19

Suzanne C. Conlon, U.S. District Judge, N.D. Ill., Feb. 19

Edward F. Harrington, U.S. District Judge, D. Mass., Feb. 19

Paul V. Niemeyer, U.S. District Judge, D. Md., Feb. 19

Appointments

William L. Dwyer, U.S. District Judge, W.D. Wash., Dec. 1

George C. Smith, U.S. District Judge, S.D. Ohio, Dec. 1

Nicholas H. Politan, U.S. District Jud D.N.J., Dec. 14

Alfred M. Wolin, U.S. District Jud D.N.J., Jan. 4

Michael B. Mukasey, U.S. District Jud S.D.N.Y. Jan. 7

Elevation

William C. O'Kelley, Chief Judge, N Ga., Jan. 1

Senior Status

Whitman Knapp, U.S. District Ju S.D.N.Y., Nov. 23

Mark A. Costantino, U.S. District Ju E.D.N.Y., Dec. 1

Cristobal C. Duenas, U.S. District Ju D. Guam, Jan. 1

Charles A. Moye, Jr., U.S. District Ju N.D. Ga., Jan. 1

William M. Steger, U.S. District Ju E.D. Tex., Jan. 1

Robert E. Demascio, U.S. District Ju E.D. Mich., Jan. 16

Clarence C. Newcomer, U.S. Dis Judge, E.D. Pa., Jan. 19

See PERSONNEL, pa

SENTENCING, from page 1

further factual development."

The court rejected the defendants' argument that the act establishing the Commission constitutes an invalid delegation of legislative power. The court found that "[t]he Act provides ample statements of policy and specific rules to guide the Commission's exercise of the delegated authority."

The court agreed, however, with the defendants' argument that the Commission is constitutionally defective under the separation of powers doctrine, because the statute creating the Commission places it in the judicial branch, whose power is limited under the Constitution to the resolution of cases and controversies, while the Commission's "duties and powers are distinctly nonjudicial in nature." The Commission's job of interpreting, monitoring, and enforcing the mandate of Congress constitutes an executive function, the court held.

The Justice Department argued that the court should sever the language of the act that designates the Commission as a part of the judicial branch, rather than declare the Commission unconstitutional. The court held that "striking the designating language and effectuating a *de facto* transfer of the Commission . . . to a different branch or to an independent status would appear to unduly frustrate Congressional intent." Moreover, even were the designating language to be severed, the Commission's composition itself would violate the Constitution, the court held. This would be so because the three judge-commissioners' independence and neutrality in their role as Article III judges would be impaired, and because the mandatory assignment of judges to an executive commission creates "an excessive intermingling of two branches of government" and "erodes the appearance of impartiality of the Judicial Branch."

The court held that it could not separate the Commission's work product from the fact of the Commission's constitutionality. "The Guide being promulgated and distribute a constitutionally flawed Commi must be held invalid."

The decision and order were " fied for immediate interlocutory or appeal as appropriate and if a able."

The orders in both *Arnold Manley* provide that if it is necessa sentence the defendants, they w sentenced according to the law applies to conduct occurring pr Nov. 1, 1987.

The *Federal Defenders of San Dieg* dismissed by the D.C. court had filed by public defender organiza seeking a declaratory judgmen Congress's grant of authority Sentencing Commission was unc tutional. Plaintiffs claimed tha guideline sentencing system workload and ethical problems torneys representing defendant

See SENTENCING,

HIEF JUSTICE, from page 1

ıles that offer greater protection of ıdividual rights than is offered by ɔgnate provisions of the United States ɔnstitution." He said *Long* merely ınounced a rule by which the Su-reme Court will decide how a decision at seems to the Court ambiguous as to rounds will be interpreted for pur-ɔses of Supreme Court review. "It ɔes not seem to me to be in any way ıfair to state courts to follow a rule at if they are to place the ruling on a round of state constitutional law hich will ensure that their decision is ɔt reviewed by our Court, they should ainly say so," the Chief Justice said.

He next turned to the question of hen federal appellate courts will cer-y questions of state law to the highest urts of the states under state certifica-ɔn procedures. The Chief Justice re-ewed the abstention doctrine, by eans of which federal courts may bmit questions of state law to state urts for determination. He noted the dilemma faced by federal courts in cases where they are asked to rule on a state statute without a fully developed factual context and where there is little or no state case law interpreting the statute. While the abstention doctrine will apply if there is a genuinely debatable question of state law, the Chief Justice suggested that state attorneys general "are not terribly happy with it, because they, like their opponents, know that the federal court will ultimately decide any federal constitutional questions in the case, and they would prefer to get the litigation over with without the additional delays resulting from abstention." Thus, the process of certifying questions of state law to state supreme courts that are willing to accept such certified questions "is a promising tool for obviating some of the great difficulties which result when a federal court attempts to interpret a state statute which has never been interpreted by the highest court of the state," the Chief Justice said. He noted the recent case of *Virginia v. American Booksellers Ass'n*, 56 U.S.L.W. 4113 (S. Ct. Jan. 25, 1988), in which questions of state law were certified to the Supreme Court of Virginia.

The Chief Justice then discussed what the relationship should be between state-court review of a death sentence and federal habeas review. He commented on the increasing number of people on death row and identified a need for "some sort of regularization of the procedures which now attend last minute appeals and requests for stay of execution." Given "the sort of chaotic conditions that often develop within a day or two before an execution is scheduled," the Chief Justice urged that "the possibility of imposing some reasonable regulations" on the situation be explored. Stating that he did "not have any particular remedy in mind," he announced that he intends to ask an appropriate committee of the Judicial Conference to look into the matter.

Copies of the Chief Justice's speech are available from the FJC's Information Services Office. ■

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etirement

George Leighton, U.S. District Judge, D. Ill., Dec. 1

Frank J. McGarr, U.S. District Judge, D. Ill., Jan. 5

eath

Marion S. Boyd, U.S. District Judge, D. Tenn., Jan. 9

ANKRUPTCY JUDGES

ppointments

E. Stephen Derby, U.S. Bankruptcy dge, D. Md., Dec. 9

Frank D. Howard, U.S. Bankruptcy dge, W.D. Wash., Dec. 22

Jo Ann C. Stevenson, U.S. Bankruptcy dge, W.D. Mich., Dec. 23

John A. Rossmeissl, U.S. Bankruptcy dge, E.D. Wash., Dec. 28

Ronald S. Barliant, U.S. Bankruptcy dge, N.D. Ill., Jan. 1

Richard T. Ford, U.S. Bankruptcy Judge, D. Cal., Jan. 1

John H. Squires, U.S. Bankruptcy Judge, D. Ill., Jan. 1

Sidney B. Brooks, U.S. Bankruptcy Judge, D. Colo., Jan. 4

Judith A. Boulden, U.S. Bankruptcy Judge, D. Utah, Jan. 5

Edward J. Lodge, U.S. Bankruptcy Judge, D. Idaho, Jan. 7

Linda B. Riegle, U.S. Bankruptcy Judge, D. Nev., Jan. 11

Nancy C. Dreher, U.S. Bankruptcy Judge, D. Minn., Jan. 25

S. Martin Teel, Jr., U.S. Bankruptcy Judge, D.D.C., Feb. 8

Christopher M. Klein, U.S. Bankruptcy Judge, E.D. Cal., Feb. 9

Brett J. Dorian, U.S. Bankruptcy Judge, E.D. Cal., Feb. 16

MAGISTRATES (FULL-TIME)

Appointments

Ann E. Vitunac, U.S. Magistrate, S.D. Fla., Nov. 30

Nancy Fiora, U.S. Magistrate, D. Ariz., Dec. 1

John T. Reid, U.S. Magistrate, D. Kansas, Dec. 1

Christine Ann Noland, U.S. Magistrate, M.D. La., Dec. 4

Robert Jake Johnston, U.S. Magistrate, D. Nev., Dec. 14

Robert M. Stone, U.S. Magistrate, C.D. Cal., Jan. 20

Robert M. Holter, U.S. Magistrate, D. Mont., Jan. 21

Paul W. Greene, U.S. Magistrate, N.D. Ala., Jan. 21

Joseph W. Scoville, U.S. Magistrate, W.D. Mich., Jan. 28

Charles F. Eick, U.S. Magistrate, C.D. Cal., Jan. 29

Sue L. Robinson, U.S. Magistrate, D. Del., Feb. 1

Barbara A. Lee, U.S. Magistrate, S.D.N.Y., Feb. 4

G.R. Smith, U.S. Magistrate, S.D. Ga., Feb. 8

Retirements

James J. Penne, U.S. Magistrate, C.D. Cal., Jan. 19

Spence Grayson, U.S. Magistrate, S.D. Ga., Jan. 27

Resignation

N. Richard Powers, U.S. Magistrate, D. Del., Jan. 27

SENTENCING, from page 6

may be sentenced under the guidelines (see *The Third Branch*, January 1988, at 1).

The court, while agreeing that a "prompt resolution" of the constitutionality of the guidelines "is crucial to maintaining the orderly functioning of our criminal justice system," said that it would not "stretch traditional standing principles to accommodate this particular case."

The court's memorandum opinion accompanying its order dismissing the suit concluded that "the harm alleged by plaintiffs . . . essentially boils down to their perception that their workload will be more complex and will markedly increase. . . . That sort of 'harm' or 'injury' is no different from the 'harm' that the passage of the Tax Reform Act of 1986 caused for tax lawyers, or . . . than the 'harm' caused for criminal lawyers by the passage of the Bail Reform and Speedy Trial Acts. . . . In addition, the fact that plaintiffs believe their clients will be harmed by the Guidelines does nothing to compensate for their lack of standing in their own right. . . . To accept plaintiffs' argument would mean that specialized sections of bar associations throughout the country would be able to sue without regard to whether or not they are representing an identifiable client with a specific grievance."

Challenges to the constitutionality of the guidelines have also been raised in several other districts. ■

LEGISLATION, from page 2

introduced H.R. 3867, to amend Fed. R. Evid. 803 to provide an explicit hearsay exception in certain child abuse cases.

• The Subcommittee on Water Resources, Transportation, and Infrastructure of the Senate Committee on Environment and Public Works held a hearing Feb. 3 on S. 1934, the bill to construct a new office building in Washington to house agencies of the judicial branch and retired justices of the Supreme Court (see *The Third Branch*, February 1988, at 8). Retired Chief Justice Warren E. Burger, AO Director L. Ralph Mecham, and George M. White, the Architect of the Capitol, testified in favor of the bill.

The new judiciary building would be constructed by a private developer, with the government providing no funds for construction costs. Th government would pay a reduce rental rate while the developer woul pay a commensurately lower rate fo the ground lease. Ownership of th land would remain with the gover ment at all times, and ownership the building would revert to the go ernment at the end of a 30-year p riod. A hearing on the judiciary buil ing bill was held before the Hou Public Works and Transportati Committee's Subcommittee on Pub Buildings and Grounds last year.

• As previously reported, legislati was enacted raising the salaries U.S. bankruptcy judges and full-ti U.S. magistrates to 92 percent of th of a U.S. district judge effective O 1, 1988 (see *The Third Branch*, Feb ary 1988, at 1). The Budget Comm tee of the Judicial Conference cons ered and agreed unanimously to r ommend a supplemental appropr tions bill that would implement salary measure effective Apr. 1. T action was approved by the Execut Committee of the Judicial Conferen on Jan. 13. The funding request been presented to the House App priations Committee.

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 20
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Court Decisions in S.D. Cal., E.D. La. Uphold Constitutionality of Sentencing Guidelines

Recent court decisions in the South-n District of California and the East-n District of Louisiana have upheld e guideline sentencing scheme. Both ecisions rejected challenges that the uidelines are unconstitutional, and e Louisiana court also rejected a allenge on statutory grounds. *U.S. Ruiz-Villanueva*, No. 87-1296-E (S.D. al. Feb. 29, 1988); *U.S. v. Chambless*, o. 87-609 (E.D. La. Mar. 9, 1988). In oth *Ruiz-Villanueva* and *Chambless* e courts rejected arguments that the uidelines constitute an excessive elegation of legislative power and olate the separation of powers doc-ne. In rejecting the delegation argu-ent, both courts found that the ower delegated to the Commission as sufficiently limited to meet the andard for a proper delegation. In jecting the separation of powers gument, they found that the pres-ce of judges on the Commission oes not compromise the impartiality of the judiciary as a whole in applying the guidelines, and noted that individual judge–commissioners could resolve questions of their own impartiality through recusal.

Addressing the separation of powers arguments, the *Ruiz-Villanueva* court found that the Sentencing Reform Act "does not unconstitutionally expand the power either of the three Article III judges who are members of the Commission or of the judicial branch as a whole." The court found that "Congress expressly created an 'independent commission'—a body that . . . would assist in the primarily judicial task of sentencing without itself exercising the judicial power." This does not exceed the scope of the judicial power, the court found, because "it is well settled that Congress may authorize judges to perform tasks that aid in the performance of their judicial functions." Defendants

See GUIDELINES, page 4

Judicial Conference of United States Endorses Legislation, Approves Videotaping of a Trial

The Judicial Conference of the nited States at its biannual meeting Washington last month endorsed risdictional provisions contained in bill pending in the House of Repre-ntatives, approved a recommenda-on that an upcoming trial be video-ped, and transmitted to the House Representatives a certificate stating at "consideration of impeachment ay be warranted" against Judge alter L. Nixon, Jr. (S.D. Miss.).

The Fifth Circuit Judicial Council rtified to the Judicial Conference on b. 11, 1988, that Judge Nixon had ngaged in conduct which might nstitute one or more grounds for peachment." The Council premised certification "entirely upon the judgment of conviction" of two counts of perjury in the Southern District of Mississippi, affirmed by the Fifth Circuit. The Supreme Court declined review Jan. 19, 1988 (see *The Third Branch*, March 1988, at 3). Any further action in this case is now within the discretion of the House.

The Conference passed two recommendations endorsing proposed changes in federal jurisdiction contained in H.R. 3152, an omnibus court reform bill. It endorsed the creation of multi-party, multi-forum jurisdiction that is intended to consolidate actions involving personal injury or property damage arising out of a single-event disaster. It also reaf-

See JUDICIAL CONFERENCE, page 2

Judges Clifford Wallace, David D. Dowd, Jr. Elected to FJC Board

The Judicial Conference of the United States has elected Judge J. Clifford Wallace of the Ninth Circuit and Judge David D. Dowd, Jr., of the Northern District of Ohio to the Board of the Federal Judicial Center.

Judge Wallace

Judge Wallace fills the position held by Justice Anthony M. Kennedy, who was elevated to the Supreme Court of the United States on Feb. 18, 1988. Judge Wallace came to the federal court system as a district judge in 1970 and in May 1972 was nominated by President Nixon for appointment to the Ninth Circuit. His service to the federal courts includes membership on such Judicial Conference committees as the Subcommittee on Federal Jurisdiction and the Committee to Consider Standards for Admission to Practice in the Federal Courts.

Judge Dowd

A prolific writer, Judge Wallace has published many articles on the courts in legal periodicals, and he has lec-

See BOARD MEMBERS, page 4

Inside . . .

Judges polled on use of experts . . . . . p. 2

Legislative developments . p. 3

New publication on appeals without arguments . . . . . p. 3

Center Studies Judges' Use of Experts Under Rule 706

Federal judges more frequently appoint experts under rule 706 of the Federal Rules of Evidence than generally recognized. A search of the case law reveals few instances in which such appointments are discussed. In a survey of active federal district court judges, however, the Federal Judicial Center's Research Division found that approximately one in five judges has appointed an expert under the authority of this rule. Of these, about half have appointed an expert on more than one occasion. The survey also asked judges to indicate the types of cases in which such assistance is likely to prove helpful. Patent cases were most frequently noted, followed by product liability and antitrust cases. In the coming months the Center will be contacting some judges by telephone seeking more information about the nature of the court appointment and how this procedure may be improved. Some judges who have not appointed experts also will be contacted to learn their views on such appointments.

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

April 1988

Dana H. Gallup, First Circuit's Executive, Retires

Dana H. Gallup, Circuit Executive of the First Circuit, has retired after serving with the First Circuit for over 40 years.

Dana H. Gallup

Chief Judge Levin H. Campbell termed Mr. Gallup's departure "a major loss to the courts," and praised him as "the model of everything an excellent court administrator and a devoted public servant can be.... I know of no single individual—administrator or judge—who has contributed more than Dana H. Gallup to the reputation and strength of the federal courts in this region."

Mr. Gallup began his court career in 1947 when he was appointed Court Crier of the First Circuit. He later became the circuit's Deputy Clerk and Chief Deputy Clerk. He was named Clerk in 1970, and in 1983, became the first person to serve as Circuit Executive of the First Circuit. He is a graduate of Suffolk University and Northeastern University School of Law and a member of the Massachusetts bar.

Grace Carey, presently Assistant Circuit Executive in the First Circuit, will be Acting Circuit Executive until Mr. Gallup's successor assumes the office.

JUDICIAL CONFERENCE, from p. 1

firmed its support for raising the required amount in controversy necessary for diversity jurisdiction from $10,000 to $50,000, a provision of H.R. 3152.

The Conference also approved a recommendation endorsing the provision of H.R. 3152 that would alter the definition of corporate citizenship for diversity purposes. That provision would amend 28 U.S.C. § 1332(c) to provide that (in addition to being a citizen of any state by which it has been incorporated) a corporation would be deemed a citizen of "any State in which it does business" rather than of "the State where it has its principal place of business."

The Conference approved a recommendation that the trial of *In re Washington Public Power Supply Sys. Securities Litig.*, No. MDL 551, be videotaped. The case, trial of which is expected to start in Tucson this year, involves more than 125,000 plaintiffs, multi-billion dollar claims, more than 200 defendants, and the expected presence in the courtroom of more than 100 attorneys. Since the trial will necessarily be protracted and some jurors or counsel may therefore miss a portion of it due to health reasons or emergencies, they will be given access to the videotapes for the time they were absent, but the videotapes will not be made public.

Among other actions, the Conference

- approved the selection of four courts to participate in a pilot project under which the courthouse buildings would be managed by the courts instead of by the GSA. The four courts are N.D. Ala., S.D. Fla., W.D. Wash., and the 11th Cir.
- voted to endorse the concept of abolishing the Board of Certification and the certification process that has been required in qualifying applicants to circuit executive positions.
- approved a resolution encouraging district courts to transfer jurisdiction of offenders on supervised release to the district courts where such persons are being supervised, particularly when a violation of supervised release has occurred.
- re-endorsed an amendment to 18 U.S.C. § 3563(a) that would provide exceptions to the requirement that if probation is imposed for a felony, the sentence must include a fine, restitution

See JUDICIAL CONFERENCE, page

Senate Passes Magistrates and Bankruptcy Judges Retirement Bill; House Version Amended

The Senate has passed S. 1630, a bill o provide enhanced retirement and urvivors' annuities for bankruptcy udges and magistrates. The bill pro-ides that a bankrupcty judge or

Senator Howell Heflin (D-Ala.), Judge Elmo B. Hunter (W.D. Mo.), Robert M. Landis of he ABA's Standing Committee on Federal Judicial Improvements, and Chief Judge Richard M. Bilby (D. Ariz.) prior to the recent hearing on S. 1482.

nagistrate with 14 years of service vould receive a pension equal to the alary at the time of leaving office; he pension could not be drawn until ge 65. The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice has marked ip the counterpart measure, H.R. 586, the Retirement Annuities for Bankruptcy Judges and Magistrates Act of 1987 (see *The Third Branch*, November 1987, at 10 and October 1987, at 1). The House amended its bill to require a 3 percent contribu-ion for 15 years and to penalize hose who leave the bench before age 65 by reducing the pension by 2 per-ent for every year one is under age 65 when one leaves the bench.

The Senate Judiciary Committee's Courts Subcommittee, chaired by Sen. Howell Heflin (D-Ala.), held hearings on S. 1482, the Judicial Branch Improvements Act (see *The Third Branch*, August 1987, at 5). Judge Elmo B. Hunter (W.D. Mo.), the former chairman of the Judicial Improvements Committee of the Judicial Conference of the United States and Chief Judge Richard M. Bilby (D. Ariz.), current chairman of the Judicial Improvements Committee, testified on behalf of the Judicial Conference. Among the subjects the bill treats are the Supreme Court's mandatory jurisdiction; court-annexed arbitration in a number of district courts; permitting clerks of court to grant temporary excuses to jurors faced with "undue hardship or extreme inconvenience"; judicial immunity; the phasing out of the Temporary Emergency Court of Appeals; and the creation of a Federal Judicial Center Foundation to accept gifts on behalf of the Center. Since S. 1482 was introduced, the Judicial Conference has approved a number of items that it recommends be added to the bill, including a provision to create a multi-party, multi-forum federal jurisdiction to consolidate in federal court cases involving personal injury or property damage arising out of a single event disaster. Such a provision is contained in H.R. 3152, on which hearings have been held.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on S. 1608, to revise the federal judicial code with respect to the administration of the U.S. Claims Court and the salaries and benefits of Claims Court judges.

The Senate passed H.R. 1212, a bill that would limit the use of polygraphs in private industry, after amending it to contain the text of S.

See LEGISLATION, page 7

Center Releases Publication on Nonargument Appeals

Most of the federal appellate courts now have specialized procedures for selecting some cases for disposition without argument, and the debate about these procedures continues. The fundamental question of the debate is whether appeals decided without arguments are receiving adequate attention. By helping to clarify the procedures involved in selecting cases for nonargument disposition, a new report released by the FJC provides a partial answer to this question.

Deciding Cases Without Argument: An Examination of Four Courts of Appeals, by Joe S. Cecil and Donna Stienstra, discusses the role of staff attorneys and special judicial panels in the selection of cases for nonargument disposition in the federal appellate courts. Based on an examination of administrative records and on interviews with clerks, senior staff attorneys, and judges, the report describes the criteria and methods used in selecting nonargument cases. It also presents the judges' views concerning the role of oral argument.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed mailing label, preferably franked (16 oz.), but do not send an envelope.

GUIDELINES, from page 1

also argued that the act violates the principle of separation of powers by vesting in the President the power to remove members from the Commission. The court held that while the Commission itself is "not an exclusively judicial entity," it "performs a primarily judicial function . . . in which all three branches must necessarily remain interested." Because the sentencing function "has never been regarded as exclusively judicial," the court said, "the power of the President to remove members of the Commission does not infringe upon an exclusively judicial function."

Ruiz-Villanueva is contrary to earlier rulings in the same district holding the guidelines invalid on separation of powers grounds. *U.S. v. Arnold*, No. 87-1279-B (S.D. Cal. Feb. 18, 1988); *U.S. v. Manley*, No. 87-1290-R (S.D. Cal. Feb. 18, 1988) (adopting reasoning of *Arnold*); *U.S. v. Rivera-Huerta*, No. 87-1329-K (S.D. Cal. Mar. 2, 1988) (also adopting *Arnold*) (see *The Third Branch*, March 1988, at 1).

In *Chambless*, the defendants attacked the constitutionality of the Sentencing Reform Act of 1984 on three grounds: that Congress unlawfully delegated its authority to fix criminal penalties; that the presence of judges on the Commission violates the separation of powers doctrine; and that the President's power to remove commissioners constitutes an impermissible control by the executive over the judiciary.

Chambless rejected all of these constitutional arguments. The delegation of power by Congress is not excessive, as Congress has provided the Commission with "explicit instructions" and "intelligible principles" to guide its work. The presence of judges on the Commission does not violate separation of powers because constitutional history and case law demonstrate that "individual judges may exercise extra-judicial power while courts may not." The court also rejected the argument that the impartiality of the entire judiciary would be adversely affected by the service of three fellow judges on the commission. Noting that "[i]t is no secret that judges disagree with each other constantly," the court found it unlikely that federal judges would be affected by the fact that other judges serve on the Commission.

As to the argument that the President's removal power over commissioners violated separation of powers or due process principles, the court held that while the Commission is situated in the judicial branch, Congress has delegated legislative power to the Commission, and "the exercise of that delegated authority in rulemaking is an executive, not judicial, function." The President's power to remove the members of a commission charged with such an executive function does not amount to an unconstitutionally impermissible control by the executive branch over the judiciary, the court said.

In addition, the defendants in *Chambless* argued that the guidelines are inconsistent with the Sentencing Reform Act—because, e.g., the guidelines require that a term of supervised release be imposed in all felony cases. They also argued that submissions to Congress by the Commission and the General Accounting Office were not timely or adequate so as to trigger the Nov. 1, 1987, effective date. The court rejected these arguments.

The government in *Chambless* contended that the defendants lacked standing unless the court determined initially that they would have received a heavier sentence under the new sentencing law than before. The court disagreed, finding that even if the guideline sentences would not be longer, defendants had a "personal stake" because the actual time served under the guidelines would likely be greater due to the abolition of parole. Moreover, under the new sentencing law each defendant "faces a period of supervised release to which he would not otherwise be subject." ■

BOARD MEMBERS, from page 1

tured at several law schools. He is a graduate of the University of California at Berkeley School of Law.

Judge David D. Dowd, Jr., will fil the position on the Board previously held by Judge A. David Mazzone (D Mass.), whose term has expired.

Judge Dowd was nominated by President Reagan for appointment t the District Court for the District o Northern Ohio in 1982. He has te years of service as a state prosecuto having served eight years as an as sistant prosecuting attorney, an two as the Prosecuting Attorney fo Stark County, Ohio. His prior judi cial experience includes five years o Ohio's Fifth District Court of Ap peals and one year as a justice of th Supreme Court of Ohio.

After graduating from the Colleg of Wooster with a B.A. degree i 1951, Judge Dowd earned a J.D. de gree in 1954 at the University o Michigan Law School.

CALENDAR

Apr. 5-8 Workshop for Docketing Supe visors
Apr. 6-8 Seminar for Magistrates of th Ninth and Tenth Circuits
Apr. 7-8 Judicial Conference Advisory Committee on Civil Rules
Apr. 13-15 Seminar for Bankruptcy Judges of Northeastern States
Apr. 17-20 Fifth Cir. Judicial Conferen
Apr. 18-22 Orientation Seminar for Ne Probation/Pretrial Officers
Apr. 20-22 Seminar for Bankruptcy Judges of Western States
Apr. 25-26 Judicial Conference Subcon mittee on Statistics
Apr. 25-27 Seminar for Judges of the Fi and Third Circuits
Apr. 25-29 Orientation Seminar for Ne Probation/Pretrial Officers
Apr. 25-29 Financial InvestigationsTrai ers' Workshop
Apr. 27-28 Judicial Conference Comm tee on the Administrative Office
May 1-4 Eleventh Cir. Judicial Confere
May 2-6 Supervisory Skills Seminar fo Probation and Pretrial Officers
May 3-6 Workshop for New Training Coordinators

NOTEWORTHY

Sanctions imposed on plaintiff for failure to improve his position at trial after rejecting mediation board's recommendation. An unsuccessful plaintiff has been ordered to pay attorney's fees and some expenses of expert witnesses after he proceeded with his lawsuit following a mediation board's rejection of his claim. In *Tiedel v. Beech Aircraft Corp.*, 118 F.R.D. 54 (W.D. Mich. 1987), plaintiff was ordered to mediation under local rule 42 of the Western District of Michigan. A hearing was held before a mediation panel, which returned a unanimous decision that plaintiff had no cause of action. Plaintiff rejected the panel's decision and the case proceeded to trial for 14 days before a jury. The jury returned a verdict of "no cause of action." Defendant filed its taxed bill of costs and motion for attorneys' fees, and defendant's motion was granted and judgment entered in its favor, awarding costs and fees in the amount of $110,993.11.

Plaintiff filed a motion to vacate the order and judgment, challenging the constitutionality and propriety of the imposition of sanctions under the local mediation rule, claiming that the rule exceeds the inherent authority of the court to promulgate rules, and that it is in violation of the right to trial by jury. He stressed that 28 U.S.C. § 2071 provides that "the rules adopted by district courts must be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." As to the cost-shifting provisions of local rule 42, plaintiff argued that in imposing the prevailing party's actual costs on the losing party, the rule is inconsistent with the Federal Rules of Civil Procedure and with 28 U.S.C. § 1920, because neither the federal rules nor the statute contain any provision for including as "costs" the prevailing parties' actual expert witness fees or attorneys' fees.

The court upheld local rule 42 as "a valid exercise of the Court's inherent power." As to the award of attorney's fees, it pointed out that in diversity cases, state law controls the imposition of attorneys' fees, including those imposed as costs. Because Michigan's mandatory mediation scheme provides that attorneys' fees may be awarded as costs if a party fails to recover a verdict greater than that awarded by the mediation panel, the court reaffirmed the award of attorneys' fees to Beech.

The court reduced the amount of the award for witness fees in light of *Crawford-Fitting Co. v. J.T. Gibbons*, 107 S. Ct. 2494 (1987), which held that absent an express statutory basis or other authority, the taxation of such costs in excess of the statutory limits is not permitted. (28 U.S.C. § 1821 provides for a $30 per day limit.)

Court taxes inmate with costs of frivolous appeal, conditions further appeals. The Fifth Circuit has upheld a district court's dismissal of a lawsuit by a prisoner, and has taxed the costs of the frivolous appeal against the inmate and barred him from filing further appeals *in forma pauperis* until the inmate has paid the appellate costs taxed, unless the district court certifies the appeal to be in good faith. *Lay v. Anderson*, No. 87-3778 (5th Cir. Feb. 12, 1988). The district court had ordered the inmate to exhaust prison remedies, but he failed to do so, and the district court dismissed the action.

The appeals court upheld the dismissal and stated its reasons for imposing additional sanctions: "This court, like the district courts in our circuit, has recently witnessed a significant increase in the number of pro se, usually prisoner, civil rights actions. . . . The large majority of these cases are without even arguable legal footing. The judicial time and resources they command are astonishingly large and divert considerable attention from other matters on our dockets. Moreover, there is a serious threat that legitimate pro se petitions will drown in the cacophony of the groundless ones. Taxing costs against an unsuccessful in forma pauperis litigant at the conclusion of his appeal is one way to defray the judicial and social burden imposed by these lawsuits." The appeals court noted that the inmate had filed at least six petitions for habeas corpus and several prisoner civil rights cases, and that during the course of the instant case he had "besieged the federal court with pleadings" over a 15-month period, including two previous abortive interlocutory appeals. As a consequence of his other cases, the appeals court had dealt with at least three other unsuccessful appeals. The inmate had previously been warned that his litigious-

See NOTEWORTHY, page 6

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

Administrative Office of the U.S. Courts. *The Selection and Appointment of United States Magistrates.* 1987.

Bazelon, David L. *Questioning Authority: Justice and the Criminal Law.* Knopf, 1988.

Bégué, Yvette, and Candace Goldstein. "How Judges Get into Trouble: What They Need to Know About Developments in the Law of Judicial Discipline." 26 *Judges' J.* no. 4 at 8 (Fall 1987).

✔ Brennan, William J., Jr. "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises." Address, Law School of Hebrew University, Dec. 22, 1987.

Bucklo, Elaine E. "From the Bench—Case Management: How to Complete Discovery Without Growing Old." 14 *Litigation* no. 1 at 3 (Fall 1987).

Clark, Charles. "The Role of National Courts in 200 Years of Evolving Governance." 18 *Cumberland L. Rev.* 95 (1987-88).

Day, David S., and Charvin Dixon. "A Judicial Perspective on Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study of Trial Court Judges and a Proposed Amendment." 20 *John Marshall L. Rev.* 377 (1987).

Eisenberg, David, Christine R. Jordan, Maeva Marcus, and Emily F. Van Tassel. "The Birth of The Federal Court System." 17 *this Constitution* at 18 (Winter 1987).

Gibbons, John J. "Judicial Review of the Constitution." 48 *University of*

See SOURCE, page 6

NOTEWORTHY, from page 5

ness must be controlled. Therefore, until the inmate pays the costs taxed against him in the case, the appeals court bars him from any further appeal *in forma pauperis*, unless the district court expressly certifies that his appeal is in good faith. As funds accumulate in the inmate's prison account or he receives any other income, prison officials must forward the money to the Clerk of Court to pay the $105 in court of appeals fees, the court ruled.

U.S. Claims Court receives award for ADR program. The Center for Public Resources Awards Program for Excellence and Innovation in Alternative Dispute Resolution has given an award for "Significant Practical Achievement" to the U.S. Claims Court for its ADR initiatives. In April 1987 the Claims Court instituted a program featuring the use of settlement judges and minitrials (see *The Third Branch*, June 1987, at 1). Chief Judge Loren A. Smith and Judge Lawrence S. Margolis of the Claims Court attended the midyear meeting of the Center for Public Resources's Legal Program to accept the Claims Court's award. ■

SOURCE, from page 5

Pittsburgh L. Rev. 963 (1987).

Griswold, Erwin N. "Reflections on Justice White." 58 *University of Colorado L. Rev.* 339 (1987).

Heflin, Howell T. "The Impeachment Process: Modernizing an Archaic System." 71 *Judicature* 123 (1987).

Hensler, Deborah R., Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson. *Trends in Tort Litigation: The Story Behind the Statistics*. Rand Corp., 1987.

Kaufman, Irving R. "Congress as Court: The Role of the Judiciary in Protecting Witnesses' Rights." 71 *Judicature* 184 (1988).

Leubsdorf, John. "Theories of Judging and Judge Disqualification." 62 *New York University L. Rev.* 237 (1987).

Miner, Roger J. "Query—Should Lawyers Be More Critical of Courts?" 71 *Judicature* 134 (1987).

Nelson, Dorothy W., Thomas M. Reavley, Thomas D. Lambros, et al. "The Future of ADR: A Prospective Look From Three Viewpoints—Jurist, Educator, and Practitioner." 14 *Pepperdine L. Rev.* 769 (1987).

O'Malley, Kevin F. "The Assessment of Costs in Federal Criminal Prosecutions." 31 *St. Louis University L.J.* 853 (1987). ■

Positions Available

Assistant to Circuit Executive, 8th Cir. Salary to $46,679, based on experience and qualifications. Assists with financial and case management, including statistical compilation and evaluation; special research projects; space and facilities; other duties as assigned. Good written communication skills a must. Degree or experience in judicial administration or law desirable. Position located in St. Paul, MN. Send resume to Circuit Executive, Box 75428, St. Paul, MN 55175. Open until filled.

Attorney-Adviser (General), Defender Services Division, Administrative Office. Salary $27,716—51,354. Assists in administering federal appointed-counsel program consisting of federal public defender and community defender organizations and CJA panel attorneys. Reviews existing and pending legislation, rules, and regulations pertaining to CJA or defender services; drafts memoranda, opinions, and legislative proposals; conducts legal research; responds to telephone and written inquiries from judges, magistrates, clerks, federal defenders, CJA panel attorneys, and public concerning the appointment and payment of counsel and experts in federal criminal cases and the operation of federal defender organizations; assists district courts with plans for implementing the CJA. Must have law degree from ABA- or AALS-accredited school, be bar member, and have 1 year professional experience post-J.D. Send SF171 for vacancy announcement 88-39, most recent annual performance appraisal (letter of recommendation for nonstatus applicant), and writing sample to Administrative Office of the U.S. Courts, Personnel Division, Room 701, Washington, DC 20544. Open until filled.

Clerk of Court, U.S. Bankruptcy Court, D. Mass. Salary $54,907-71,377. Requires 10 years progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility. Undergraduate education may be partially substituted for maximum of 3 years of required general experience; law degree may be substituted for an additional 2 years. Submit resume or SF171 to Mrs. Jean Bates, U.S. Bankruptcy Court, 1101 Thomas P. O'Neill Federal Building, Boston, MA 02222-1074, marked Confidential, by May 16, 1988.

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LEGISLATION, from page 3

1904 (see *The Third Branch*, January 1988 at 2). The House passed H.R. 1212 in November 1987.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on § 614 of S. 1482, and on S. 1512 and S. 1515, bills intended to address the issue of judicial immunity from liability for attorneys' fees in actions seeking declaratory and injunctive relief, an area of concern since the Supreme Court's *Pulliam v. Allen* decision. George E. Danielson, an associate justice of the California Court of Appeal and a member of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, testified.

The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights held an oversight hearing on the National Crime Information Center.

The House passed a bill previously passed by the Senate, S. 557 (see *The Third Branch*, March 1988, at 2), which is intended to overturn the Supreme Court's *Grove City College* decision, which had limited the reach of title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964 to the specific program receiving federal funds. President Reagan vetoed the measure Mar. 16, and Congress overrode the President's veto on Mar. 22.

Rep. Patricia Schroeder (D-Colo.) introduced H.R. 4064, to authorize the appointment of an additional bankruptcy judge in each of the districts of Colorado and Kansas.

Senator John F. Kerry (D-Mass.) introduced S. 2109, a bill to amend title 18 of the U.S. Code to protect the civil rights of individuals from discrimination on the basis of affectional or sexual orientation.

Rep. Robert Kastenmeier (D-Wis.) introduced H.R. 4021, the Federal Prison Industries Reform Act of 1988, a bill to amend title 18 of the U.S. Code to permit Federal Prison Industries, Inc., to borrow from the Treasury. Federal Prison Industries is a wholly-owned, self-sufficient government corporation formed by an act of Congress and executive order in 1934. It operates 75 factories in 42 federal correctional institutions and provides employment and training opportunitites for inmates. It has traditionally funded all capital expenditures from retained earnings. "Because of the unprecedented growth of the inmate population . . . and the concomitant demand for additional industrial programs," the program has undertaken an expansion program in recent years, according to Rep. Kastenmeier. Expansion requires steady cash flows, which can be provided by conferring borrowing authority, he said.

Sen. Alan Dixon (D-Ill.) introduced S. 2059, to make international parental abduction of children a felony. He observed that the legislation would enable the United States to extradite parental child abductors in many cases where extradition treaties apply, and would strengthen the State Department's hand in negotiating for the return of abducted children.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on S. 1347, to facilitate implementation of the Hague Convention on the Civil Aspects of International Child Abduction. The Senate has already ratified the Hague Convention; the legislation would set specific procedures to implement provisions of the Convention, which was written in general terms to take into account the different legal systems of the signatory countries. The legislation provides for concurrent original jurisdiction in state and federal courts to hear return proceedings arising under the Convention and the legislation; places the burden of proving an exception to the return obligation on the person opposing return; and specifies docu-

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PERSONNEL

CIRCUIT JUDGES

Confirmation

Paul R. Michel, U.S. Circuit Judge, Fed. Cir., Feb. 29

Death

Luther M. Swygert, U.S. Circuit Judge, 7th Cir., Mar. 16

DISTRICT JUDGES

Nominations

Alex R. Munson, U.S. District Judge, Northern Mariana Islands, Feb. 25

John C. Lifland, U.S. District Judge, D.N.J., Feb. 29

James R. McGregor, U.S. District Judge, W.D. Pa., Mar. 14

Confirmations

Rudy Lozano, U.S. District Judge, N.D. Ind., Feb. 25

Stephen M. Reasoner, U.S. District Judge, E.D. Ark., Feb. 25

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Feb. 25

Appointment

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Mar. 11

BANKRUPTCY JUDGES

Appointment

Peter W. Bowie, U.S. Bankruptcy Judge, S.D. Cal., Mar. 2

Law Day To Be Observed May 1

May 1 is Law Day. This year's theme is "Legal Literacy," encouraging citizens to increase their knowledge and understanding of the law.

The American Bar Association is national coordinator of Law Day USA, and offers a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many promotional and educational materials. Further information is available from Law Day USA, American Bar Association, 8th Floor, 750 N. Lake Shore Dr., Chicago, IL 60611 (tel. 312/988-6134).

JUDICIAL CONFERENCE, from p. 2

tion, community service, or any combination of the three.

• adopted a resolution encouraging the district courts to continue their guideline training efforts and to sponsor programs that will also educate the bar, whose knowledge of sentencing guidelines procedure is essential to effective implementation.

• approved the establishment of the recommended "special" and "general" alternative attorney compensation rates under the Criminal Justice Act, effective with respect to services performed on or after the date of the Judicial Conference action and subject to the availability of funds.

• approved sustaining grants for fiscal years 1988 and 1989 for the four proposed death penalty resource center/community defender organizations, subject to the availability of funds. The approval was also contingent upon each proposed organization obtaining the state and other nonfederal funds that the organization has indicated are necessary to finance the state component of its proposed activities, and also contingent upon final approval of all necessary CJA plan amendments. (The four proposed death penalty resource center/community defender organizations would be in Mississippi, Tennessee, North Carolina, and Georgia).

• voted that any judicial vacancy lasting longer than 18 months will be considered a judicial emergency, and urged all judges nearing retirement to notify the President and the AO as far in advance as possible of an anticipated change in job status. (As of Mar. 15, 1988, there were 37 vacancies on the district courts and 11 vacancies on the courts of appeals).

• reaffirmed its opposition to requiring counsel's participation in voir dire examination.

• took the following positions on certain provisions of S. 1867, proposed amendments to the Court Interpreters Act, 28 U.S.C. § 1827: opposed the proposed requirement that eight unspecified languages be certified; opposed categorical requirement of electronic sound recording of interpretations; approved prepayment for interpreting services at the court's discretion; and approved providing a uniform fee schedule for services.

• approved memorial resolutions honoring the late Judge Carl McGowan (D.C. Cir.) and the late Judge Edward Weinfeld (S.D.N.Y.).■

LEGISLATION, from page 7

ments that need not be authenticated or legalized. In the House, Rep. Tom Lantos (D-Cal.) has introduced H.R. 3971 and H.R. 3972, bills to facilitate the implementation of the Convention. The Judicial Conference in March 1986 recommended that litigation under the Convention be exclusively in state courts. ■

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Center Surveying Personal Computer Use in Chambers, Compiling Software Catalog

The Innovations and Systems Development Division of the Center is conducting a survey of the use of personal computer software in the federal courts, with emphasis placed on the current and anticipated uses of personal computers in chambers. Information sought from the survey includes: 1) identification of commercially available programs found to be particularly beneficial to the operation of the chambers; 2) identification of software packages developed in chambers or elsewhere in the court that might be of interest to others; and 3) areas in which there is a need or potential for the application of personal computer technology that would be beneficial to the operation of chambers. In addition to these areas, the survey will solicit information about training and support requirements for the efficient use of personal computers and the programs used. A written questionnaire will be distributed in May to the Clerk of each district and circuit for use in collecting the information from chambers.

The results of the survey will be used to create a catalog of personal computer software resources used in the federal courts that might be of interest to other members of the judiciary. It is anticipated that the initial publication of the catalog will be distributed widely within the judiciary and that periodic updates will be provided. The catalog will also be made available as a computer data base to allow automated searching of the descriptions of the software packages identified. In addition to providing this clearinghouse function for personal computer software, the Center will provide limited copying and distribution services for court-developed software that is submitted by a court and requested by a member of the federal judiciary for use in the court or in chambers. ■

Rules Would Implement Law Ending "Race to Courthouse"

Judicial Panel on Multidistrict Litigation Seeks Comments on Multicircuit Appeals Rules

The Judicial Panel on Multidistrict Litigation, chaired by Judge Andrew A. Caffrey (D. Mass.), has proposed new rules relating to multicircuit appeals under the new law passed by Congress to deal with the "race to the courthouse" situation, and is accepting comments on these proposed rules until May 31. The new law, Pub. L. 100-236, provides for random selection of the circuit in which an appeal will be heard when appeals from an agency decision are filed in more than one circuit. It was signed by the President on Jan. 8, 1988 (see *The Third Branch*, February 1988, at 7).

The proposed new rules include rules providing for the filing of a notice of multicircuit petitions for review with the Clerk of the Panel on Multidistrict Litigation; for the service of notices; for the form of such notices; and for the method of random selection of the circuit by the Clerk of the Panel or a designated deputy.

Copies of the proposed multicircuit appeals rules can be obtained from the Clerk of the Judicial Panel on Multidistrict Litigation, 1120 Vermont Ave., N.W., Suite 1002, Washington, DC 20005. They can also be found at 840 F.2d no. 2 at ci-cxvii. Comments on the rules must be submitted in writing (in original form with 13 copies), and received no later than May 31, 1988, at the above address. ■

Courts' Local Rules on Sentencing Guidelines Have Varied Emphases

Almost half of the district courts have so far implemented local rules, orders, and policy statements to accommodate the special needs of guideline sentencing. Some of these documents have not been formally adopted, pending review by the bar or for other reasons. Local procedures for guideline sentencing vary from one district to another.

Several procedures for sentencing are prescribed by statute or federal rules. Although the Sentencing Reform Act of 1984 did not significantly change the nature of sentencing proceedings, it does provide that the presentence report is to be disclosed at least 10 days prior to the date set for sentencing, unless the defendant waives this minimum period (18 U.S.C. § 3552(d)). Federal Rule of Criminal Procedure 32 imposes other requirements, some of which were added by the Sentencing Reform Act. The Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is considering further revision of rule 32 in light of guideline sentencing and has solicited comments (see *The Third Branch*, January 1988, at 2).

In formulating procedures for guideline sentencing, most courts have generally adopted the approach of the

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Study of jury service in lengthy trials published . . . p. 5

Administrative Office establishes Office of Planning and Evaluation . . . . . p. 7

LOCAL RULES, from page 1

proposed model local rule for guideline sentencing that was circulated last August to all U.S. circuit and district judges by the former Probation Committee of the Judicial Conference (see *The Third Branch*, January 1988, at 2).

The Sentencing Guidelines also contain guidelines for sentencing procedure in Part 6A and policy statements for accepting guilty pleas and plea agreements in Part 6B. The Probation Committee's commentary accompanying the model local rule took the position that judges were free to follow the procedures of the local rule rather than those of the guidelines because "the Sentencing Reform Act does not authorize the Commission to prescribe procedural rules." Some districts' rules, however, adhere closely to the Part 6A guidelines. Some courts have adopted modified versions of the local rule, or have blended the approach of the model rule with that of Part 6A.

The major difference between the approach of the guidelines and the approach of the Probation Committee's model local rule lies in the role of the probation officer. The model local rule assigns the probation officer a more active role in assisting the court in identifying disputed issues among the parties over facts or the application of the statutes and guidelines to those facts. Thus, the model local rule directs the officer to consider objections of the parties to the preliminary presentence report, to revise the presentence report as warranted by the parties' objections, and to submit a revised presentence report to the court. The model local rule also provides for an addendum to the presentence report, in which the officer identifies those parts of the report still disputed by either of the parties and that provides the officer's comments.

Part 6A of the Sentencing Guidelines contemplates that, in addition to the presentence report filed by the probation officer, the parties will present unresolved disputes over sentencing facts and factors directly to the court. Guideline § 6A1.3 further contemplates that the court may provide the parties with its tentative findings on disputed matters, perhaps prior to the date of sentencing.

All of the rules increase the statutory minimum number of 10 days between the disclosure of the presentence report and sentencing. Many courts have adopted the 20-day minimum recommended by the model local rule—10 days for the parties to communicate objections to the officer and an additional 10 days for the officer to revise the report after receiving those objections.

The commentary accompanying the model rule recommended that the presentence report be made part of the record of the case, but that it be placed under seal "in accordance with the long-standing practice of treating presentence reports as nonpublic in view of the sensitive and often confidential information they contain." Neither the model local rule itself, however, nor the Sentencing Guidelines include any specific provision on copying or further disclosure of the report.

It would appear that a majority of the courts' local rules do not specify whether copying of the report is permitted, or what further disclosure may be made. A minority of the local rules in force prohibit the copying of the presentence report and provide that parties must return the report to the probation officer.

Under the old pre-Guidelines system, the presentence report was not included in the record on appeal unless the presentence report was at issue. Section (c)(2) of 18 U.S.C. § 3472 now requires that it be included in the record whenever a criminal appeal includes a challenge to the guideline sentence. At least one circuit, the Fourth, has adopted a policy according to which the district court, if it wishes the presentence report to be treated as a confidential document, must transmit the report to the Court of Appeals under seal, and under which a party wishing the report to be treated as confidential must move the Court of Appeals to seal it.

Some districts set a time period for the preparation of the presentence re-

See LOCAL RULES, page 8

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Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

May 1988

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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Vincent R. Johnson and Lane V. Sunderland Chosen As Judicial Fellows for 1988-1989

Vincent R. Johnson and Lane V. Sunderland have been chosen as Judicial Fellows for 1988-1989. Vincent R. Johnson is a professor of law at St. Mary's University School of Law in San Antonio, Texas. He received a B.A. from St. Vincent College in 1975, a J.D. from Notre Dame Law School in 1978, and an LL.M. from Yale Law School in 1979.

Vincent Johnson

Mr. Johnson clerked for Judge Bernard G. Meyer at the New York Court of Appeals from 1978 to 1980 and for Chief Judge Thomas E. Fairchild at the Seventh Circuit from 1980 to 1982. Since 1982, he has taught at St. Mary's University School of Law. The primary focus of his work has been tort law. He has also become involved in the field of legal ethics, teaching a course on professional responsibility and lecturing to judges throughout Texas on judicial ethics. Mr. Johnson is a cofounder and faculty member of St. Mary's summer law program at the University of Innsbruck, Austria. He has served as the national chairman of the Teaching Methods Section of the Association of American Law Schools.

Lane Sunderland

Lane V. Sunderland is Chairman of the Department of Political Science and International Relations at Knox College in Illinois. He holds a B.A. from Kansas State University (1967), an M.A. in political science from the University of Washington (1968), and a Ph.D. in government from Claremont Graduate School (1972). From 1972 to the present, Mr. Sunderland has held various positions at Knox College, including Pre-Law Advisor and Associate Dean of the College of Academic Affairs. His scholarly interests have focused on constitutional theory and the significance of the Supreme Court in American government, and he has published numerous articles on these subjects. He served as Director of Educational Programs for the Commission on the Bicentennial of the United States Constitution in 1986, resigning that position in 1987 to return to teaching at Knox. Mr. Sunderland has traveled to Europe to lecture on the Constitution under the sponsorship of the Council of Europe and the Atlantic Council.

Patterned after the White House and Congressional Fellowships, the Judicial Fellows Program offers opportunities for highly talented professionals with multidisciplinary backgrounds to contribute to the federal system. ■

CALENDAR

May 1-4 Eleventh Circuit Judicial Conference
May 2-6 Supervisory Skills Seminar
May 3-6 Workshop for New Training Coordinators
May 8-10 Seventh Circuit Judicial Conference
May 13 Federal Circuit Judicial Conference
May 13-14 Judicial Conference Advisory Committee on Bankruptcy Rules
May 16-18 Jury Utilization Seminar
May 16-18 Workshop for Assistant Circuit Executives
May 16-20 Seminar for Chief Probation/Pretrial Clerks
May 18-20 Seminar for Bankruptcy Judges
May 19-20 Judicial Conference Advisory Committee on Criminal Rules
May 22-24 D.C. Circuit Judicial Conference
May 23-27 Orientation Seminar for New Probation/Pretrial Officers
May 27 Judicial Conference Committee of the Pacific Territories
June 2-3 Judicial Conference Committee on Administration of the Bankruptcy System

LEGISLATION

The following measures before Congress are of interest to the judiciary.

• Rep. Robert W. Kastenmeier (D-Wis.) introduced H.R. 4340, the amended version of his earlier bill, H.R. 2586, to provide for enhanced retirement and survivors' annuities for bankruptcy judges and U.S. magistrates (see *The Third Branch*, April 1988, at 3).

• Rep. James M. Jeffords (R-Vt.) introduced H.R. 4309, a bill that would make retroactive the survivor annuity program improvements in Pub. L. 99-336, the Judicial Improvements Act of 1985 (see *The Third Branch*, September 1986, at 9). That law set a floor for judicial survivors' benefits, but applied only to survivors of judges who qualified after Oct. 1, 1986. H.R. 4309 would include as beneficiaries of Pub. L. 99-336 surviving spouses of federal judges who qualified before that date. Because the number of affected persons is small, the bill would "provide substantial assistance to the surviving spouses . . . at very little cost to the public," Rep. Jeffords stated. He had previously introduced a similar bill in the 99th Congress.

• S. 951, as amended, the bill to establish the Federal Courts Study Commission, was ordered favorably reported by the full Senate Judiciary Committee.

• The House has authorized the Committee on the Judiciary to spend $725,000 for investigations and studies of the two judicial impeachment proceedings presently before the Committee. Those proceedings involve Judge Alcee L. Hastings (S.D. Fla.) and Judge Walter L. Nixon, Jr. (S.D. Miss.).

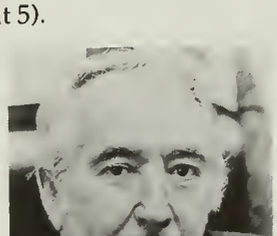
As previously reported, the Judicial Conference of the United States in March certified that Judge Nixon has engaged in conduct that might constitute one or more grounds for impeachment (see *The Third Branch*, April 1988, at 1). On Mar. 17, following receipt of the Judicial Conference's certification,

See LEGISLATION, page 6

NOTEWORTHY

Judicial immunity for judge's law clerk upheld on appeal. The Second Circuit has affirmed a district court decision that a judge's law clerk is entitled to the protection of judicial immunity. *Oliva v. Heller*, 839 F.2d 37 (2d Cir. 1988) (see *The Third Branch*, January 1988, at 5).

House Judiciary Committee Chairman Rodino to retire. Rep. Peter W. Rodino, Jr. (D-N.J.) has announced that he will retire at the end of his current term in Congress. First elected to the House in 1948, Rep. Rodino became chairman of the House Judiciary Committee in 1973.



Rep. Rodino

Fifth Circuit holds district courts not authorized to refer appeal from bankruptcy court to magistrate. The Fifth Circuit has held that 28 U.S.C. § 636 does not authorize the district courts to refer to a magistrate an appeal of a bankruptcy court decision. *Minerex Erdoel, Inc. v. Sina, Inc.*, No. 86-1449 (5th Cir. Mar. 3, 1988). The court reviewed the legislative history of the 1984 Bankruptcy Amendments and Federal Judgeship Act of 1984, and concluded that Congress provided an intricate, balanced, and elaborate scheme for bankruptcy appeals in 28 U.S.C. § 158. Under that scheme, appeals could be taken either to the district court or to a panel of bankruptcy judges. No other kind of appeal was recognized or permitted under the scheme, nor does the legislative history indicate that any other type of appeal was contemplated, the court said. If Congress had meant for its appeal scheme to include the potential for a reference to a magistrate, it would have expressly so provided, the court said.

Fourth Circuit holds public, press have right of access to names on jury venire list. The public and press have a right to the names and addresses of jurors selected for a trial, as well as the names of the venirepersons from whom the jury was selected, the Fourth Circuit has held. *In re Baltimore Sun*, No. 87-1207 (4th Cir. Feb. 19, 1988). A newspaper covering a criminal trial in a district court requested access to the venire list prepared by the clerk of court. The list was used by the parties to the trial in exercising their peremptory strikes during jury selection. The list contained information on all jurors who were part of the venire; information other than names was included on the list for the convenience of the attorneys and parties, but was apparently not required by any statute or rule. The information was taken from questionnaires filled out by the jurors. The district court denied the newspaper's request for the list, and the newspaper applied to the Fourth Circuit for a writ of mandamus. The Fourth Circuit held that the information on the jury venire list is protected from disclosure by 28 U.S.C. § 1867(f), because the section protects the "contents of records or papers used by . . . the clerk in connection with the jury selection process." After the jury has been selected, however, the Fourth Circuit held, the names and addresses of those jurors are a part of the public record, and the names and addresses of those who have been stricken or otherwise not seated are likewise a matter of public record. The Fourth Circuit noted that it was not basing its holding on either the First Amendment or the Sixth Amendment but rather on the discussion of the jury system in *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984), which held that the voir dire examination of prospective jurors should ordinarily be open to the public and the press, and on *Press-Enterprise Co. v. Superior Court of Cal. ("Press-Enterprise II")*, 106 S. Ct. 2735 (1986).

Positions Available

Chief Deputy Clerk, D. Mass. Salary to $54,907. Applicant must have a minimum of 6 years progressively responsible administrative experience in public service or business. Bachelor's degree in judicial administration, public or business administration, political science, criminal justice, law, management, or related fields highly desirable. Send resumes by June 1 to Clerk, U.S. District Court, 1525 U.S. Courthouse, Boston, MA 02109 Attention: CDC-88.

Chief Deputy Clerk, 2d Cir. Salary $54,907 to $71,377. Responsible to Clerk for overall administration of office; acts for Clerk in her absence. Requires undergraduate degree in management; judicial, business, or public administration; criminal justice; or political science. Minimum of six years administrative or appropriate professional experience in public service or business, demonstrated leadership ability, management skills. Graduate degree in law, public or business administration may be substituted for up to two years of experience. Send resumes by May 30 to Elaine B. Goldsmith, Clerk, U.S. Court of Appeals, 1702 U.S. Courthouse, 40 Foley Square, New York, NY 10007.

U.S. Magistrate, W.D. Mo. Salary $72,500. Jurisdiction specified in 28 U.S.C. § 636. Applicant must be member in good standing of the bar of the highest court of Missouri; have been engaged in the active practice of law for at least 5 years (some substitution possible); be less than 70 years old; not be related to a judge of the W.D. Mo.; reside in the general vicinity of Kansas City, Mo. Applications due June 3. Application forms and further information available from R.F. Connor, Clerk, U.S. District Court, Room 201, 811 Grand Avenue, Kansas City, MO 64106.

Assistant Director for Planning and Evaluation, Administrative Office of the U.S. Courts (Announcement No. 88-S46). Salary $72,500. Principal advisor to AO Director on program evaluation, assessment, improvements, and planning. Applicants must have managerial and technical qualifications and experience sufficient for the job. For additional information, call (202) 633-6116. Closing date May 20. Applicants must submit completed SF-171 (no resumes) and one or more work-related letters of reference and/or most recent annual performance appraisal to Administrative Office of the U.S. Courts, Personnel Div., Rm. 701, 811 Vermont Ave., N.W., Washington, DC 20544. Attn: Stanley E. Riggenbach.

EQUAL OPPORTUNITY EMPLOYERS

Defendant Ordered to Pay Costs, Fees After "Sham" Participation in Court-Ordered Arbitration

A district court has ordered the defendant airline in a civil suit to reimburse the plaintiffs for all costs and fees they incurred in preparing for and participating in the court's compulsory arbitration program, following a finding by the arbitrator that the airline's participation in the arbitration was a "sham." *Gilling v. Eastern Airlines, Inc.*, No. 85-4917 (D.N.J. Mar. 2, 1988).

The plaintiffs sued the airline on a variety of civil counts after being removed from their flight during a stopover after incidents on board. General Rule 47 of the District of New Jersey required referral of the matter to compulsory arbitration. The airline appeared at the arbitration through counsel, but no witnesses for the airline appeared. The arbitrator found for the plaintiffs. Within the 30 days allotted by rule 47(G)(1), the airline moved for a trial de novo. Plaintiffs opposed the motion, contending that the airline's failure to participate meaningfully in the arbitration should cost it the right to demand a trial de novo. The court remanded the case to the arbitrator for a factual finding on the question of the meaningfulness of the airline's participation in the arbitration. The arbitrator found that the airline's attorney merely "went through the motions," reading a few interrogatories and parts of deposition transcripts, and that 95 percent of her participation was stating position and fact summaries.

General Rule 47(E)(3) provides that in the event that a party fails to participate in the arbitration process in a meaningful manner, as determined by the arbitrator, the Court may impose appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo filed by that party."

The court found that the rule "appears to place the determination of meaningfulness entirely in the hands and discretion of the arbitrator," without setting any standard of review of the arbitrator's findings. The court concluded that the arbitrator's finding that the airline's participation in the arbitration was not meaningful "was supported by substantial evidence and was not clearly erroneous."

The airline argued that denying its demand for a trial de novo would deprive it of its constitutional right to a jury trial and conflict with the Federal Rules of Civil Procedure. The court held that it need not reach that constitutional claim, noting that while the "extreme sanction [of striking a demand for a trial de novo] may be appropriate where a party absolutely refuses to participate in or even attend arbitration, . . . the court declines to deprive defendants of their day in court because of their limited performance at arbitration, without in any way condoning it." The court ordered the airline to reimburse plaintiffs for all costs and fees incurred in preparing for and participating in the arbitration, as well as those incurred in opposing the demand for a trial de novo. "[C]ounsel should be on notice that a trial de novo will not be automatically permitted in those cases in which the party seeking it views the arbitration proceeding merely as a meaningless interlude in the judicial process," the court said. ■

THE SOURCE

The publications listed below may be of interest to readers.

Bonventre, Vincent Martin. "A Classical Constitution: Ancient Roots of Our National Charter." 59 *New York State Bar J.* no. 8 at 10 (Dec. 1987).

Brazil, Wayne D. "From the Bench: Making the Opening Settlement Offer." 14 *Litigation* no. 2 at 3 (Winter 1988).

Bremer, Celeste F., and W. Scott Simmer. "One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa." 36 *Drake L. Rev.* 297 (1986-1987).

Carroll, Stephen J., et al. *Assessing the*

See SOURCE, page 7

Center Releases Report on Jury's Role in Lengthy Civil Trials

Concern over the role of the jury in lengthy civil trials has focused on the characteristics of the jurors, the burdens of lengthy jury service, and the ability of jurors to deal with massive amounts of evidence. A new report by the FJC, *Jury Service in Lengthy Civil Trials*, by Joe S. Cecil, E. Allan Lind, and Gordon Bermant, addresses the differences in the characteristics and experiences of jurors serving in lengthy civil trials and jurors serving in similar trials of shorter duration.

The report indicates that jurors serving in lengthy trials were more likely to be unemployed or retired, to be unmarried, to be women, and to lack a college education. While statistically significant, these differences in demographic characteristics were small in magnitude. Although the jurors in both long and short civil trials indicated some disruption in their normal lives, more than 80 percent indicated that they would be willing to serve if they were called for jury service again. Jurors found the evidence difficult to understand at times, and jurors in long trials were more likely to report experiencing difficulty with the evidence. Jurors in long trials also were more likely to indicate difficulty with the jury instructions. Despite these differences, it appears that jurors in lengthy civil trials experience less burden than expected, find the evidence to be difficult but manageable, and deliberate in a manner that is conducive to arriving at a reasoned and principled decision.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed mailing label, preferably franked (4 oz.), but do not send an envelope.

CALR Guidelines for Computer Use by Judges in Chambers Approved

The Judicial Conference recently approved new guidelines for the expansion of computer assisted legal research (CALR) into chambers. The Conference approved access to LEXIS in chambers for judges and magistrates who have LEXIS-compatible PC equipment and who are willing to cancel at least $1,000 of their annual library costs.

Under the guidelines, CALR will be offered to those judicial officers who have existing equipment in chambers capable of accessing LEXIS without upgrading or replacing equipment, except for modems and data communication lines.

Although the *Five-Year Plan for Automation of the U.S. Courts* envisions providing CALR in all chambers, it cannot be done at this time because of budget constraints.

PERSONNEL

CIRCUIT JUDGES

Nomination

Judith R. Hope, U.S. Circuit Judge, D.C. Cir., Apr. 14

Confirmations

Emmett R. Cox, U.S. Circuit Judge, 11th Cir., Apr. 15

David M. Ebel, U.S. Circuit Judge, 10th Cir., Apr. 19

Resignation

Robert H. Bork, U.S. Circuit Judge, D.C. Cir., Feb. 5

DISTRICT JUDGES

Nominations

William H. Erickson, U.S. District Judge, D. Colo., Mar. 23

Karl S. Forester, U.S. District Judge, E.D. Ky., Mar. 30

Simeon T. Lake III, U.S. District Judge, S.D. Tex., Mar. 30

William G. Cambridge, U.S. District Judge, D. Neb., Apr. 13

See PERSONNEL, page 7

LEGISLATION, from page 3

Rep. Peter Rodino, Jr. (D-N.J.), Chairman of the House Judiciary Committee, joined by Reps. Don Edwards (D-Cal.), Hamilton Fish, Jr. (R-N.Y.), and F. James Sensenbrenner, Jr. (R-Wis.) as cosponsors, introduced H. Res. 407, calling for the impeachment of Judge Nixon. Judge Nixon is presently in prison serving concurrent sentences for conviction on two counts of perjury, and has indicated that he will not resign. Prior to receiving the Judicial Conference's certificate concerning Judge Nixon, the House had authorized the expenditure of $350,000 by the Committee on the Judiciary for impeachment investigation and study. On Mar. 29 the Subcommittee on Accounts of the House Administration Committee reviewed Rep. Rodino's justification for additional funding for impeachment investigation and studies, and on Mar. 30 the House passed H. Res. 408, as amended, authorizing an additional $375,000 to be provided to the Committee on the Judiciary for such purposes. According to Rep. Joseph M. Gaydos (D-Pa.), the additional $375,000 "should enable the Judiciary Committee to hire temporary staff and to meet necessary travel, witness, telephone, supply, and equipment expenses" arising out of the Nixon investigation.

• The Senate passed S. 952, a bill to provide the Supreme Court with greater discretion in deciding which cases it will review. The bill would substantially eliminate the Court's mandatory jurisdiction. The majority of cases subject to mandatory jurisdiction are those in which (1) a lower federal court invalidates an act of Congress in proceedings in which the United States is a party; (2) a court of appeals holds a state statute invalid because it violates the Constitution, treaties, or laws of the United States; and (3) the highest court of a state has either held a treaty or statute of the United States invalid or upheld the validity of a state statute in the face of a constitutional challenge. S. 952 would provide for review of such cases by certiorari. An omnibus court reform bill pending in the House, H.R. 3152, also contains a provision to eliminate the Court's mandatory jurisdiction (see *The Third Branch*, October 1987, at 1). The concept of affording the Court greater discretion in deciding which cases it will review has been supported by Chief Justice Rehnquist and former Chief Justice Burger, the Judicial Conference, the Department of Justice, and the ABA. Efforts to enact such a measure have been made periodically for almost a decade.

• The House has passed H.R. 3971, an act to establish procedures for implementing the 1980 Hague Convention on the Civil Aspects of International Child Abduction (see *The Third Branch* April 1988, at 7-8). The Senate also passed the bill, after amending a section of it to make clear that state and U.S. district courts will have concurrent original jurisdiction over actions arising under the convention. During debate on the Senate amendment, Sen. Alan Dixon (D-Ill.) stated that the bill has been carefully drafted to avoid the possibility "that these cases would embroil the Federal courts in deciding child custody matters." He noted that a section of the bill provides that "the [Hague] convention and this act empower courts in the United States to determine only rights under the convention and not the merits of any underlying child custody claims." Sen. Orrin Hatch (R-Utah) noted that the Judicial Conference, the Conference of Chief Justices, and the Justice Department favor vesting in the state courts exclusive jurisdiction of all legal actions under the Hague Convention. He pointed out that while "child custody has traditionally been a State court matter, the interpretation of treaties with foreign countries is a responsibility of the federal courts under section 2 of article III of the Constitution," and that "the issues of treaty interpretation and child custody are inseparably combined." Sen. Paul Simon (D-Ill.) and Sen. Dixon noted that the Hague

See LEGISLATION, page

ERSONNEL, from page 6

Richard A. Schell, U.S. District Judge, D. Tex., Apr. 13

onfirmations

Bernard A. Friedman, U.S. District dge, E.D. Mich., Mar. 31

Kenneth M. Hoyt, U.S. District Judge, D. Tex., Mar. 31

Jack T. Camp, Jr., U.S. District Judge, D. Ga., Apr. 19

Bernard A. Friedman, U.S. District dge, E.D. Mich., Apr. 19

Emilio M. Garza, U.S. District Judge, D. Tex., Apr. 19

Lowell A. Reed, U.S. District Judge, E.D. ., Apr. 19

Kimba M. Wood, U.S. District Judge, D.N.Y., Apr. 19

Thomas S. Zilly, U.S. District Judge, W.D. ash., Apr. 19

evations

James DeAnda, Chief Judge, S.D. Tex., ar. 21

Thomas C. Platt, Jr., Chief Judge, D.N.Y., Mar. 31

tirement

ohn L. Kane, Jr., U.S. District Judge, D. lo., Apr. 4

aths

Raymond E. Plummer, U.S. District dge, D. Alaska, Dec. 26

Fred M. Taylor, U.S. District Judge, D. ho, Feb. 16

William Harold Cox, U.S. District Judge, . Miss., Feb. 25

mination Withdrawn

Alfred C. Schmutzer, Jr., U.S. District dge, E.D. Tenn., Mar. 28

NKRUPTCY JUDGES

pointments

Arthur M. Greenwald, U.S. Bankruptcy dge, C.D. Cal., Mar. 9

Robin L. Riblet, U.S. Bankruptcy Judge, . Cal., Mar. 30

Alan M. Ahart, U.S. Bankruptcy Judge, . Cal., Apr. 4

Kathleen T. Lax, U.S. Bankruptcy Judge, . Cal., Apr. 4

Leslie J. Tchaikovsky, U.S. Bankruptcy dge, N.D. Cal., Apr. 14

Lynne Riddle, U.S. Bankruptcy Judge, . Cal., Apr. 15

Vincent P. Zurzolo, U.S. Bankruptcy dge, C.D. Cal., Apr. 18

AO Director Mecham Announces Establishment Of Office of Planning and Evaluation

Director L. Ralph Mecham has announced the establishment within the AO of the Office of Planning and Evaluation. The essential purpose of the new office will be to assist in the delivery of support services to the judiciary through enhanced planning, coordination, and resource management. In addition, the new office will conduct periodic reviews of the AO's ongoing programs and will help to develop and implement the judiciary's work measurement systems.

"Both prior to, and since my appointment as Director of the Administrative Office, a number of Judicial Officers and employees have suggested that the Administrative Office needed to improve its planning and evaluation capability. I, too, recognized the desirability of such a capability. . . . Given the present shortage of resources, and the expectation that resource constraints will continue, establishment of a strong planning capability is essential if the Administrative Office is to continue to provide adequate service to the Judiciary," Director Mecham said.

Recruitment to fill the position of Assistant Director for Planning and Evaluation will commence immediately, Mr. Mecham said. Pending the selection of a permanent director of the office, Clarence "Pete" Lee will serve as Acting Assistant Director for Planning and Evaluation and will lead a task force to implement the reorganization. (For position announcement describing application procedure, see page 5). ■

SOURCE, from page 5

Effects of Tort Reforms. Rand Corp., 1987.

Colburn, Don. "The Jury That Knew Too Much—Jurors Are Sometimes Asked to Disregard Things They Know—But Can They?" *Washington Post*, Apr. 12, 1988, Health Section, p. 7.

Committee on Federal Legislation. "An Analysis of the Need for Legislation to Remedy Grand Jury Irregularities." 43 *The Record of the Association of the Bar of the City of New York* 35 (1988).

Committee on Federal Legislation. "A Proposal for Federal Legislation to Facilitate the Testimony of Child Witnesses." 43 *The Record of the Association of the Bar of the City of New York* 54 (1988).

Copple, Robert F. "From the Cloister to the Street: Judicial Ethics and Public Expression." 64 *University of Denver L. Rev.* 549 (1988).

Craig, Barbara Hinkson. *Chadha—The Story of an Epic Constitutional Struggle*. Oxford University Press, 1988.

"The Federal Courts Since 1787: Stability and Change in 200 Years" (Panel discussion, including Judge Stephen Reinhardt (9th Cir.)). 71 *Judicature* 116 (1987).

Federal Sentencing Guidelines Manual. West Publishing Co., 1988.

Fitzpatrick, Collins T. "Misconduct and Disability of Federal Judges: The Unreported Informal Responses." 71 *Judicature* 282 (1988).

In Memoriam: Wade H. McCree, Jr. 32 *Law Quadrangle Notes* no. 1, at 3 (Fall 1987).

Kaufman, Irving R. "Electoral Integrity vs. Free Speech." *The New York Times*, Mar. 7, 1988, at A19.

Mikva, Abner J. "A Reply to Judge Starr's Observations." 1987 *Duke L.J.* 380 (see *infra* under Starr).

Miner, Roger J. "The Tensions of a Dual Court System and Some Prescriptions for Relief." 51 *Albany L. Rev.* 151 (1987).

Moynihan, Cornelius J., Jr. "Making Greater Use of Federal Magistrate Civil Jurisdiction." 35 *Federal Bar News & J.* 35 (1988).

Ripple, Kenneth F. "On Becoming a Judge." 34 *Federal Bar News & J.* 380 (1987).

Rotunda, Ronald D. "Remembering Judge Walter R. Mansfield." 53 *Brooklyn L. Rev.* 271 (1987).

Starr, Kenneth W. "Observations About the Use of Legislative History." 1987 *Duke L.J.* 371 (see *supra* under Mikva).

Weis, Joseph F., Jr., and Gordon Bermant. "Automation in the Federal Courts: Progress, Prospects and Problems." 26 *Judges' J.* no. 4, at 14 (Fall 1987).

Zimmer, Markus B. "Promoting Team Management in Federal Trial Courts." 71 *Judicature* 215 (1988).

LEGISLATION, from page 7
Convention and the implementing legislation leave custody decisions concerning abducted children to local courts and authorities, while providing a mechanism for the child's prompt return to the country of the child's habitual residence.

• Rep. Rodino introduced H.R. 4243, to implement the International Convention on the Prevention and Punishment of Genocide.

• Rep. Kastenmeier introduced H.R. 4238, to authorize appropriations for carrying out the activities of the State Justice Institute for FY 1989, 1990, and 1991, with authorization levels of $15 million, $15 million, and $20 million, respectively. He noted that the Institute's program guideline for both FY1987 and 1988 designated projects that would "improve the administration of justice in the State courts and at the same time . . . reduce the work burdens of the Federal courts" as being of "special interest" to the Institute. The guideline cited the following areas as particularly suited for such projects: state court civil cases where a party is also subject to a federal bankruptcy proceeding; the adjudication of federal law questions by state courts; and better allocation of judicial burdens between state and federal courts. Rep. Kastenmeier noted that the Institute, in its first round of FY1987 funding, funded a number of projects that should be of "substantial value to the Federal courts," and that many of the proposals in its final FY1987 funding round also seek to conduct research or demonstration projects in state courts that would benefit the federal courts,

• The House passed the Federal Employee Leave Transfer Act, H.R. 3757, a bill that would permit federal employees to donate annual leave to co-workers who face a prolonged absence from work due to a personal emergency. ■

LOCAL RULES, from page 2
port. The period between plea or verdict and sentencing varies from no more than 60 days in some districts to no less than 90 days in one district. Almost all of the rules authorize the judge to modify the time period for good cause.

Rules differ in the various procedures they establish for the form and manner of filing objections to the presentence report; in setting out a standard of proof; in the disposition to be made of the presentence report after sentencing or if an appeal is taken; and on other matters.

The legislation authorizing and giving effect to the Sentencing Guidelines significantly expands the grounds for appellate review of criminal sentences. A future *Third Branch* article will discuss rules, orders, and procedures adopted by the courts of appeals for handling appeals from guideline sentences.

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 20
NUMBER 6
JUNE 1988

ongress Weighs Impeachment Study Bill, ankruptcy Judges' and Magistrates' Benefits

The following measures before ngress are of interest to the judici-.

• Rep. Robert Kastenmeier (D-Wis.) roduced H.R. 4393, the Judicial scipline and Impeachment Reform t of 1988, a bill to amend provi-ns of 28 U.S.C. relating to judicial cipline. The bill would establish a member commission to study for e year the constitutional issues volved in the impeachment of an ticle III judge and then to report on ether changes are needed. (A joint olution introduced in the House in 37, H.R.J. Res. 364 (see *The Third nch*, November 1987, at 3) pro-ses amending the Constitution to rmit bodies in the judicial branch to nove judges for cause.)

• H.R. 4340, providing enhanced retirement and survivors' benefits for bankruptcy judges and magistrates (see *The Third Branch*, May 1988, at 3), was reported by the House Judiciary Committee.

• H.R. 3971, establishing procedures to implement the 1980 Hague Convention on the Civil Aspects of International Child Abduction, was signed by the President on Apr. 19 as Pub. L. 100-300.

• S. 952, a bill giving the Supreme Court greater discretion in deciding what cases it will review, was reported by the House Judiciary Committee.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Rep. Kastenmeier,

See LEGISLATION, p. 2

enter Prepares Additional Materials for uideline Training of Court Personnel, Bar

he Federal Judicial Center is de-oping additional resources for use guideline sentencing training in the trict courts. These include video ograms depicting a presentence ort conference between a proba-n officer and counsel and the sub-quent sentencing hearing in the ne fictitious case. A set of these leo programs and related written terial was shipped in mid-April to h district court, in care of the pro-ion office.

n cooperation with the Defender vices Division of the Administra-e Office, the Federal Judicial Cen-is also producing a training pack-e especially for defense attorneys t district courts may use in spon-ing seminars for panel attorneys d other members of the defense bar their districts. AO Director L. ph Mecham recently provided chief judges more information about the dissemination of this package, which consists of four video programs, written materials, and suggestions for the materials' use. The video programs cover Statutory Changes, Basic Guidelines Application and Departures, Multiple Counts and Criminal History, and Appeals.

The Judicial Conference of the United States adopted a resolution on Mar. 15, 1988 that encourages district courts to "continue their guideline training efforts and to sponsor programs that will also educate the bar, whose knowledge of sentencing guideline procedures is essential to effective implementation." About 5,000 judges, probation officers, other court personnel, and members of the bar participated in over 200 in-district guideline orientation programs from October 1987 through March 1988. ■

Judge Richard J. Daronco Slain at Home in New York

Judge Richard J. Daronco (S.D.N.Y.) was fatally shot at his home in Pelham, New York, on May 21. Immediately after the slaying, the killer, the father of a litigant in a case that had been before Judge Daronco, committed suicide.

Judge Daronco's death marked the second time this century that a fed-

Don Hogan Charles/NYT PICTURES

eral judge has been assassinated. District Judge John H. Wood, Jr., (W.D.Tex.) was slain in May of 1979.

Judge Daronco, nominated by President Reagan Jan. 2, 1987, took his seat on the bench June 8, 1987. Prior to becoming a federal judge, he served in the state judiciary of New York—from 1971 to 1974 as a family court judge, and from 1974 to 1979 as a county judge on the Westchester County Court. From 1979 he was a Supreme Court Justice for the Ninth Judicial District of New York.

Judge Daronco was born in New York City in 1931 and graduated from Providence College and Albany Law School. He served in the U.S. Army, and then was engaged in the practice of law in White Plains, N.Y. from 1958 until 1971.

Judge Daronco is survived by his wife, Joan O'Rourke Daronco, and five children. ■

JUN 8 ENT'D
FEDERAL DEPOSITORY

LEGISLATION, from page 1

continued markup of H.R. 3152, the Court Reform and Access to Justice Act of 1987 (see *The Third Branch*, October 1987, at 1). The bill includes numerous features that have been proposed by the Judicial Conference in the past. Among the bill's features are court-annexed arbitration provisions, pay raises for circuit executives, elimination of the Board of Certification for Circuit Executives, a number of proposals affecting jury selection, provision for the establishment of a foundation that could accept gifts on behalf of the Federal Judicial Center, and other amendments relating to the FJC. The subcommittee approved an amendment by Rep. Benjamin L. Cardin (D-Md.) that would eliminate federal diversity jurisdiction. This amendment replaced a provision in the bill that would have raised the jurisdictional amount in diversity cases from the present $10,000 to $50,000.

• The Criminal Justice Subcommittee of the House Judiciary Committee held hearings regarding the impeachment resolution in the matter of Judge Alcee L. Hastings (S.D. Fla.) (see *The Third Branch*, November 1987, at 9).

• Rep. Lynn M. Martin (R-Ill.) introduced H.R. 4576, to amend title VII of the Civil Rights Act of 1964 to prohibit in the legislative or judicial branches of the federal government employment discrimination based on race, color, religion, sex, handicap, national origin, or age. The bill would establish an employment review board composed of senior federal judges, which would have authority to adjudicate claims regarding such discrimination.

• Sen. Pete Wilson (R-Cal.) introduced S. 2251, a bill to provide the death penalty for the killing of any federal, state, or local law enforcement officer or corrections officer involved in drug law enforcement.

• Rep. Thomas J. Manton (D-N.Y.) introduced H.R. 4278, to amend the Controlled Substances Act to provide for the imposition of the death penalty for the intentional killing of a law enforcement officer and for certain continuing criminal enterprise drug offenses. The bill would provide the death penalty for the murderer of a law enforcement officer and for the "drug kingpin" who orders the killing of any individual. Sen. Alphonse M. D'Amato (R-N.Y.) introduced a companion measure, S. 2206.

• Rep. Don Sundquist (R-Tenn.) introduced H.R. 4289, to amend title 18 to provide penalties for knowingly engaging in conduct that is likely t transmit AIDS.

• The Senate Judiciary Committee Subcommittee on Courts and Admi istrative Practice held hearings on 1961, to establish a uniform system procedures to facilitate the collectio of debts owed to the United States.

• The Senate Committee on Vete ans Affairs held hearings on S. 11, th Veterans Administration Procedu and Judicial Review Act, introduce by Sen. Alan Cranston (D-Cal.). Th bill would authorize judicial revie of certain financial decisions of th Administrator of Veterans' Affai and provide for the payment of re sonable attorneys' fees in Veteran Administration cases. The Committe also held hearings on S. 2292, intr duced by Sen. Frank H. Murkows (R-Alaska), which would provide f judicial review of rulemaking by t Veterans' Administration and wou allow attorneys' fees.

Judges Stephen S. Breyer (1st Ci and Morris S. Arnold (W.D. Ark testified at the hearing on behalf

See LEGISLATION, page

CALENDAR

June 2–3 Judicial Conference Committee on the Administration of the Bankruptcy System

June 3 Judicial Conference Committee on Intercircuit Assignments

June 6–10 Financial Investigations: Training-for-Trainers

June 6–12 Fordham Graduate Program for Probation Officers

June 7–8 Judicial Conference Committee on Judicial Resources

June 12–25 National Criminal Defense College Trial Practice Institute, Session I

June 13–14 Judicial Conference Committee on Space and Facilities

June 13–15 Workshop for Clerks of District Courts

June 13–17 Seminar for Pretrial Chiefs and Supervisors

June 15–17 Judicial Conference Committee on Defender Services

June 16 Seminar for Sr. Staff Attorneys

June 19–24 Orientation Seminar for Newly Appointed Bankruptcy Judges Section II

June 20–21 Judicial Conference Committee on the Administration of the Magistrates System

June 20–23 Video Orientation Semina for Newly Appointed District Judges

June 22–24 Judicial Conference Committee on Criminal Law and Probation Administration

June 22–24 Seminar for Magistrates o the Sixth, Seventh, and Eighth Circuits

June 23 Judicial Conference Committee on the Judicial Branch

June 27–28 Judicial Conference Committee on Court Security

June 27–28 Judicial Conference Committee on Federal–State Jurisdiction

June 27–29 Judicial Conference Committee on Judicial Improvements

June 27–29 Training Coordinators fo Fourth and Tenth Circuits

June 30–July 2 Fourth Circuit Judicial Conference

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Summary Jury Trial Requirement Upheld by E.D. Kentucky

The district court has the power under a local rule to order parties to participate in nonbinding summary jury trials, the Eastern District of Kentucky has held. *Williams v. Hall*, No. 84-149 (E.D. Ky. Apr. 5, 1988). The decision is contrary to the recent opinion of the Seventh Circuit in *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988) (see *The Third Branch*, March 1988, at 3).

The plaintiffs in *Williams* claimed that the defendant company had discharged them due to their unwillingness to cooperate in schemes that amounted to the bribery of foreign officials. The case was set for a six-week trial. Over the plaintiffs' objection, the court ordered a five-day summary jury trial under local rule 83 of the Joint Local Rules for the U.S. District Courts of the Eastern and Western Districts of Kentucky. That rule provides that "[a] judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution." After the Seventh Circuit's decision in *Strandell*, the *Williams* plaintiffs moved for reconsideration of the order setting their case for summary jury trial.

The court found that the local rule was intended to authorize mandatory summary jury trial. Fed. R. Civ. P. 83 authorizes district courts to adopt local rules consistent with the federal rules. The Supreme Court has upheld the validity of local rules that are not outcome-determinative, the court noted. Thus, case law has upheld the validity of local rules requiring mandatory arbitration, and even of a local rule requiring mandatory mediation and providing for sanctions in the event a party did not better its position at trial by 10 percent over the valuation set by the mediators. "A

See SUMMARY JURY, page 8

Senate Judiciary Committee Approves Bill Banning Weapons in Federal Courthouses

15,000 Illegal Weapons Found at Federal Courts' Doors in '87

The Senate Judiciary Committee recently approved legislation proposed by the U.S. Marshals Service that would prohibit the possession of firearms and other dangerous weapons in federal courthouses. The measure was included by the committee as a part of S. 2180, the Undetectable Firearms Act of 1988.

Stanley E. Morris, Director of the U.S. Marshals Service, said that the legislation was proposed to help "combat a disturbing trend" in the number of dangerous weapons discovered by court security officers at courthouse entrances. Last year alone, Marshals Service court security officers prevented more than 75,000 weapons—over 15,000 of which were illegally possessed—from being carried into federal courtrooms, according to Mr. Morris. "These figures are especially ominous in light of the increasing frequency of highly sensitive federal trials involving major drug traffickers, terrorists, and other extremely dangerous criminals," Mr. Morris said.

> ***"These figures are especially ominous in light of the increasing frequency of highly sensitive federal trials involving major drug traffickers, terrorists, and other extremely dangerous criminals."***
>
> **Stanley E. Morris, Director, U.S. Marshals Service**

There is currently no federal criminal statute that specifically prohibits the possession of a dangerous weapon in a federal courthouse. The only federal law relating to the subject is a General Services Administration regulation that prohibits the possession of weapons on federal property. The maximum penalty for violating that regulation is only 30 days' incarceration and a $50 fine. For an appropriate criminal sanction to apply given "the absence of meaningful federal law," Mr. Morris said, persons attempting to carry weapons into federal courtooms must be arrested and charged under state law. "This resort to state law makes for a lack of uniformity among the 94 federal judicial districts which the Marshals serve, both in terms of the procedures our personnel must follow upon detecting a weapon and the certainty and severity of punishment for offenders," Mr. Morris said.

S. 2180 would make the carrying or attempted carrying of a firearm or other dangerous weapon, such as a bomb or long-bladed knife, into a federal courthouse punishable by up to one year in jail and a $100,000 fine. Possessing, or attempting to possess, such a weapon in the courtroom itself or in offices or areas that provide administrative or operational support for the court—including the judge's chambers, clerk's office, and U.S. Attorney's and Marshal's offices—would be a felony punishable by imprisonment for up to two years and a fine of up to $250,000. Possession of a firearm or other dangerous weapon in a courthouse with intent to use the weapon to commit a crime would be punishable by up to five years' imprisonment and a felony-level fine. ■

NOTEWORTHY

Seventh Circuit holds that judge need not recuse himself because of son's representation of party in unrelated matter. The Seventh Circuit has held that a district judge properly refused to recuse himself in a case where the judge's son, a lawyer, had represented the petitioners' insured for about a month on an unrelated matter. *In re National Union Fire Ins. Co. of Pittsburgh*, 839 F.2d 1226 (7th Cir. 1988). After the judge refused to recuse himself, counsel for insurers filed a petition for a writ of mandamus, seeking his removal on the ground that his "impartiality might reasonably be questioned" under 28 U.S.C. § 455(a). The judge's son had been hired by the petitioners' insured, a bank, to represent it in a transaction other than the matter before the judge. The Seventh Circuit noted that the judge's son had recently represented another bank in a similar transaction and had been hired to avoid the time and expense of educating the bank's regular counsel about the "unusual" type of transaction involved, the son's firm had not been hired at a greater rate than it usually charged, and the son's engagement did not create a likelihood of his doing significant future work for the client. The Seventh Circuit held that the engagement of the judge's son on a single matter "is not similar in quality or quantity to the sort of disqualifying interests listed in § 455(b), and therefore does not call for disqualification under § 455(a)."

Tenth Circuit offers "Dial-a-Ruling" service. Tape recordings of recent rulings of the Tenth Circuit and a brief explanation of the legal reasoning of the decisions can be heard by telephone in Denver. Two phone answering machines are used, each with a seven-minute capacity, according to Clerk of Court Robert Hoecker. The judge who writes the ruling prepares the telephone synopsis, which is kept on the tape for seven days. Lawyers and news reporters use the service instead of trying to speak with an individual in the clerk's office. The service is believed to be the only one of its kind in the federal system.

District court authorizes plaintiff newspaper to seek costs and fee from defendant state judge. A U.S. district court in New York has held that a county judge's action in closing pretrial proceedings in a criminal case violated the public's qualified right of access to the courts and has permitted the plaintiff to recover costs from the judge. *Johnson Newspaper Corp. v. Morton*, No. CIV-85-1168E (W.D.N.Y. Mar. 3, 1988). A county judge in New York, concerned about the possible prejudicial effect of pretrial publicity, ordered pretrial proceedings in a criminal case closed to the public and the press. Plaintiff newspaper brought suit in federal district court under 42 U.S.C. § 1983, claiming that the judge's action had deprived the newspaper of its First and Fourteenth Amendment rights. It sought a declaration that the order violated its right of access to the courts. It also sought prospective relief directing the judge, when considering future motions for closure of hearings, to refrain from ordering closure unless such a step is necessary, is the least restrictive available remedy, and there exists no other reasonably availabl venue in the state where a fair trial coul be conducted. The defendant judge i recognition of the holding in *Pulliam v Allen*, 466 U.S. 522 (1984), did not clai judicial immunity, but did raise Eleven Amendment, mootness, and abstentio arguments. The district court held that th action for prospective relief was not pre cluded by the Eleventh Amendment, tha the issue was not moot because it wa capable of evading repetition yet woul likely evade review in the future, and tha abstention was not appropriate.

The district court further found that th judge's order closing the hearing to th press had violated the public's qualifie constitutional standards, relying in pa on *Press-Enterprise Co. v. Superior Court Cal. ("Press-Enterprise II")*, 106 S. Ct. 27 (1986), whose decision postdated th county judge's ruling that was at issue

The district court granted the plaintif motion for summary judgment declari the judge's action unconstitutional, b did not issue a permanent injunction, sa ing that to do so would be "intrusive a unworkable." The district court's ord permits the plaintiff to apply for fees a costs under 42 U.S.C. § 1988 and to r cover them from the defendant judge.

Three bills pending in the Senate, 1512, S. 1515, and S. 1482, address t issue of judicial immunity in the wake *Pulliam v. Allen*. A Senate Judicia Committee subcommittee held a heari on the bills recently (see *The Third Bran* April 1988, at 7).

Ninth Circuit Historical Socie launches new journal. The Ninth Judic Circuit Historical Society has publish the first issue of *Western Legal Histo* The journal, to be issued twice year will contain illustrated articles, annotat reviews of historical documents, bo reviews and notices, and other inform tion relating to all aspects of the history law in the American West. The Soci has more than 1,500 members, includi individuals, universities, law schools, l firms, and libraries. The Society occasio ally publishes books, produces exhib collects oral histories, and in other wa preserves the West's legal history. In 19 it gathered the oral histories of a numb of eminent lawyers and judges, and w publish in book form an edited collecti of excerpts from some of the intervie It is also working on a guide to le

See NOTEWORTHY, pag

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Court Technology Conference Co-sponsored by AO, FJC, and Other Organizations Held in Denver

The Second National Conference on Court Technology, co-sponsored by the National Center for State Courts and its Institute for Court Management, the FJC, the AO, and more than 20 other organizations, was held in Denver, Colorado, Apr. 25–27. Almost 1,500 persons attended the conference, including nearly 100 persons from the federal courts. Over 55 different sessions were conducted during the conference on topics ranging from desktop publishing to litigation support, video arraignments, optical disk storage of court records, and court security. Among the topics that received the most attention were alternative records storage strategies, public access to court information, and successful approaches to designing, funding, and acquiring automated court management systems at the local level.

Of particular interest was a session entitled "Ten Technology Solutions for Judges," which was conducted by Judges David L. Phares (Maricopa Cty., Ariz.) and R. Ryan Reinhold (Navaho Cty., Ariz.). In this session attendees learned about opportunities for judges to use automation in chambers to improve the quality of their work product and to manage their workload better. During the second half of the session attendees were paired to work directly on personal computers using software that the presenters had identified as being very useful to judges. At the end of the session the attendees were given copies of all of the software used during the session to take home with them and use in their courts.

John Greacen, Clerk of the U.S. Court of Appeals for the Fourth Circuit, made a presentation at two sessions entitled *Federal Automated Case Management Software: Is There Anything Here for State and Local Courts?* He reviewed the development and the far-reaching capabilities of the electronic docketing system used in many federal courts and planned for national expansion in the next few years. The federal software and documentation is in the public domain, he noted, and available at a nominal cost to state and local courts that might want to implement it. Although no federal support could be provided to any recipient court, Mr. Greacen recommended strongly that courts considering the development and im-

See TECHNOLOGY, page 8

Applications for 1989–1990 Judicial Fellows Program Invited

The Judicial Fellows Commission invites applications for the 1989–90 Judicial Fellows Program. The program seeks to attract and select outstanding individuals from a variety of disciplinary backgrounds who have an interest in judicial administration and who show promise of making a contribution to the judiciary.

Two fellows will be chosen to spend a year, beginning in September 1989, at the Supreme Court of the United States or the Federal Judicial Center. Candidates should be familiar with the federal judicial system, have at least one postgraduate degree, and two or more years of successful professional experience. Fellowship stipends are based on salaries for comparable government work and on salary histories of the fellows but will not exceed the GS 15, step 3 level (presently $58,567).

The Judicial Fellows program was established in 1972 and is patterned after the White House and Congressional Fellowships.

Information about the program and on application procedures is available from Noel J. Augustyn, Executive Director, or Vanessa Yarnall, Associate Director, Judicial Fellows Program, Supreme Court of the United States, Washington, D.C. 20543. (202) 479-3374. Applications should be submitted by Nov. 15, 1988.

Administrative Office Releases Data on Courts' 1987 Workload

The Administrative Office has released *Federal Judicial Workload Statistics December 1987*, a report containing a statistical summary of the business of the courts for the twelve-month period ending Dec. 31, 1987.

During 1987, filings and terminations reached record high levels in the 12 regional courts of appeals. Total annual filings rose 3 percent, to 35,700 appeals, up from 34,753 appeals in 1986. Most of the increase occurred in federal and state prisoner petitions, which combined increased by more than 1,100 cases. The number of dispositions increased by 4 percent, from 33,936 appeals in 1986 to 35,276 in 1987. This growth in dispositions reflects increases both in terminations on the merits after submission on briefs (up 11 percent) and in procedural terminations by staff (up 7 percent). For the past two years, merit dispositions after submission on briefs have grown steadily and each year comprised a larger portion of the overall termination workload in the regional courts of appeals. Due to the large number of terminations, the overall pending caseload grew less than 2 percent, to 26,894 appeals. The increase for cases pending in 1987 represents the lowest numerical and percentage growth in the regional courts since 1982.

During 1987, a total of 233,292 civil cases were filed in the district courts, a 4 percent decrease from the 1986 filings. The largest decrease in civil filings occurred in VA cases, which dropped from 24,516 to 17,122. Filings in Social Security disability insurance cases increased from 8,542 to 11,275 and prisoner civil rights petitions from 22,553 to 24,082. Social Security supplemental security income case filings rose from 2,155 to 2,935 and ERISA filings from 5,777 to 6,468. ■

LEGISLATION, from page 2

the Judicial Conference of the United States. Judge Breyer is the Judicial Conference's representative to the Administrative Conference of the United States. Judge Arnold is a member of the Committee on Federal–State Jurisdiction of the Judicial Conference. The Judicial Conference opposes judicial branch review of veterans' claims for benefits as contained in S. 11. If Congress deems review of veterans' claims to be absolutely necessary, the judges suggested, such review should remain with the Board of Veterans Appeals or be conferred upon a new Article I executive branch court. "Judicial review should be limited to the review of constitutional issues and statutory interpretations, as is contemplated in S. 2292. Appellate-type review could be had either in the district court on the limited basis of reviewing the record, as is done in Social Security cases, or in the court of appeals, as contained in S. 2292. The Judicial Conference will oppose any provisions requiring judicial review of any factual determination of the Veterans Administration," Judge Arnold testified.

• An amended version of S. 1934, a bill authorizing the construction of a building for federal judicial agencies and retired Supreme Court justices, was reported by the Senate Committee on Environment and Public Works. The amended version, introduced by Sen. Daniel Patrick Moynihan (D-N.Y.) would limit the height of the building to 80 feet, rather than the 94 feet previously proposed. The amended version would also specify that space not used as judiciary offices must be rented to other government agencies rather than to private tenants.

• Rep. Joseph J. DioGuardi (R-N.Y.) introduced H.R. 4406, a bill to amend 18 U.S.C. to provide for mandatory random drug testing of federal probationers.

• Rep. Jim Olin (D-Va.) introduced H.R. 4464, a bill to amend the Federal Rules of Civil Procedure with respect to sanctions for the violation of rule 11. The bill would amend the last sentence of rule 11 to read: "For a wilful violation of this rule, an attorney may be subjected to appropriate disciplinary action." The amendment would restore language that was in the rule prior to its 1983 amendment. The bill "will allow judges to impose sanctions at their discretion but no longer *requires* them to impose sanctions," Rep. Olin said. In his view, the current rule 11 "has not had the desired effect" of limiting the number of frivolous lawsuits, but has "added to the problem, adding new cases to the judges' dockets" in the form of litigation over rule 11.

• The House Foreign Affairs Subcommittee on Human Rights approved H.R. 1417, a bill that would permit torture victims who live in the United States to bring civil suits against their torturers. ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

Aspen, Marvin E. "Some Thoughts on the Historical Origins of the United States Constitution and the Establishment Clause." 21 *John Marshall L. Rev.* 239 (1988).

"Constitutional Scholarship: What Next?" (Symposium, including Richard A. Posner). 5 *Constitutional Commentary* 17 (1988).

Dumbauld, Edward. "Algernon Sydney on Public Right." 10 *University of Arkansas at Little Rock L.J.* 317 (1987–88).

Galligan, Thomas C., Jr. "Article III and the 'Related to' Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction." 11 *University of Puget Sound L. Rev.* 1 (1987).

Goldberg, Arthur J. "Death and the Supreme Court." 15 *Hastings Constitutional L.Q.* 1 (1987).

Goldstein, Steven M. "Application of Res Judicata Principles to Successive Federal Habeas Corpus Petitions in Capital Cases: The Search for an Equitable Approach." 21 *U.C. Davis L. Rev.* 45 (1987).

Logan, David A. "Judicial Federalism in the Court of History." 66 *Oregon L. Rev.* 454 (1988).

Lubet, Steven. "Regulation of Judges' Business and Financial Activities." 37 *Emory L.J.* 1 (1988).

Maatman, Gerald L., Jr,. and Gigi Ann Gilbert. "Summary Jury Trial: The Long & Short of It." *CBA Record*, April 1988, at 18.

MacCoun, Robert J. *Getting Inside the Black Box: Toward a Better Understanding of Civil Jury Behavior*. Rand Corp., 1987.

McFeeley, Neil D. "En Banc Proceedings in the United States Courts of Appeals." 24 *Idaho L. Rev.* 255 (1987–88).

Re, Edward D. "The Presumption of Judicial Review in International Trade Disputes." 10 *Boston College International and Comparative L. Rev.* 173 (1987).

Redlich, Norman. "In Memoriam: Judge Edward Weinfeld." 62 *New York University L. Rev.* 927 (1987).

Ross, William G. "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees." 62 *Tulane L. Rev.* 109 (1987).

Sanctions: Rule 11 and Other Powers, Second Edition. ABA Section of Litigation, 1988.

Schwarzer, William W. "Rule 11 Revisited." 101 *Harvard L. Rev.* 1013 (1988).

Smith, Christopher E. "Who Are the U.S. Magistrates?" 71 *Judicature* 143 (1987).

Strauss, Peter L. "One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action." 87 *Columbia L. Rev.* 1093 (1987).

Wald, Patricia M. "Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House." 72 *Minnesota L. Rev.* 1 (1987).

Western Legal History. Winter/Spring 1988. Ninth Judicial Circuit Historical

Bankruptcy court clerks George B. Cauthen (D.S.C.) and Beth A. Dick (N.D. Ohio) discuss the development of a long-range training plan for bankruptcy court personnel at a recent meeting of the Bankruptcy Education and Training Committee.

NOTEWORTHY, from page 4

history resources to aid researchers. The Board of the Society is chaired by Chief Judge James R. Browning (9th Cir.). For further information, contact Chet Orloff, Director, Ninth Judicial Circuit Historical Society, P.O. Box 2558, Pasadena, CA 91102-2558 tel. (818) 405-7059).

Presentence report released to third party where presumption of confidentiality overcome. A defendant's privacy interest in presentence report does not survive his death, and third-party petitioners overcame the presumption of confidentiality and were entitled to the release of such a report, the Ninth Circuit recently held. *U.S. v. Schlette*, No. 87-1106 (9th Cir. Mar. 31, 1988). Schlette, while on probation, killed the state district attorney who had successfully prosecuted him many years before, then committed suicide. The estate of the murder victim and a newspaper applied to the district court for release of Schlette's presentence investigation report. The government opposed disclosure on the grounds of confidentiality. The district court denied disclosure under both FOIA and Fed. R. Crim. P. 32(c). The estate and the newspaper sought a writ of mandamus ordering the district court to release the report.

The Ninth Circuit noted the strong presumption in favor of confidentiality and also noted that no reported cases had found disclosure of such a report to a third party necessary to serve the ends of justice. The court discussed a Federal Judicial Center study of rule 32(c) that led to a 1983 amendment of the rule to further increase disclosure of reports to defendants. The court noted that while privacy concerns may militate against disclosure in a given case, when the defendant is dead this ground for nondisclosure is foreclosed, as privacy interests do not survive death. The newspaper argued that both the First Amendment and the public interest supported disclosure. Without reaching the First Amendment argument, the court held that the common-law right of access to judicial records was sufficient to warrant disclosure here, where no legitimate reason for preserving secrecy had been articulated by the district court or by the government.

The estate argued that it required access to the presentence report and related documents so that it could determine whether it had a cause of action for negligence based upon the probation service's failure to warn the former prosecutor of the threat posed to him by Schlette. "We express no opinion on whether the estate may state a claim based upon this theory," the court wrote, but since "the requested documents are relevant to a contemplated claim and . . . the information . . . in them cannot be obtained elsewhere," the estate had made a sufficient showing of need for disclosure of the presentence report, and the psychiatric and postsentence probation reports. The Ninth Circuit remanded the case to the district court to redact information from the documents, "consistent with this opinion, which the district court determines is the kind of information . . . which should remain confidential." ■

PERSONNEL

CIRCUIT JUDGES

Nomination

Pamela A. Rymer, 9th Cir., Apr. 26

Confirmations

Emmett R. Cox, 11th Cir., Apr. 15
David M. Ebel, 10th Cir., Apr. 19

Elevation

Albert J. Engel, Chief Judge, 6th Cir., Apr. 1

Nomination Withdrawn

David C. Treen, 5th Cir., May 10

DISTRICT JUDGES

Nominations

Norwood C. Tilley, Jr., M.D.N.C., Apr. 26
Charles R. Butler, Jr., S.D. Ala., Apr. 28
Fern M. Smith, N.D. Cal., May 9
Jan E. DuBois, E.D. Pa., May 10

Confirmations

Jack T. Camp, Jr., N.D. Ga., Apr. 19
Bernard A. Friedman, E.D. Mich., Apr. 19
Emilio M. Garza, W.D. Tex., Apr. 19
Lowell A. Reed, E.D. Pa., Apr. 19
Kimba M. Wood, S.D.N.Y., Apr. 19
Thomas S. Zilly, W.D. Wash., Apr. 19

Appointment

Stephen M. Reasoner, E.D. Ark., Apr. 9

Deaths

Burnita Shelton Matthews, D.D.C., Apr. 25
Robert Van Pelt, D. Neb., Apr. 27
Caleb R. Layton, D. Del., May 6
Richard J. Daronco, S.D.N.Y., May 21

BANKRUPTCY JUDGES

Appointments

Leslie J. Tchaikovsky, N.D. Cal., Apr. 14
Lynne Riddle, C.D. Cal., Apr. 15
Vincent P. Zurzolo, C.D. Cal., Apr. 18
Louis M. Phillips, D. La., May 2

Elevation

Ray Reynolds Graves, Chief Judge, E.D. Mich., Apr. 14

MAGISTRATES (FULL-TIME)

Appointments

William G. Hussmann, Jr., S.D. Ind., Apr. 4
Kenneth R. Fisher, W.D.N.Y., Apr. 20
Paul Taylor, W.D.N.C., Apr. 29

SUMMARY JURY, from page 3

summary jury trial is far less intrusive . . . than the local rules upheld by the above authorities. No presumption of correctness attaches to the verdict of the summary jury, nor is any sanction imposed for failure to accept its advisory verdict. It is merely a useful settlement device." Thus, as a summary jury trial "is essentially nonbinding arbitration with an advisory jury instead of arbitrators," local rule 23 must be held valid.

The court distinguished the case before it from *Strandell* on the grounds of the existence of the local rule expressly providing for the use of summary jury trials; no such local rule existed in *Strandell*. The district court in *Strandell* had held the use of the summary jury trial procedure to be authorized by Fed. R. Civ. P. 16, the court's inherent authority, and a resolution of the Judicial Conference of the United States endorsing the experimental use of the procedure. *Strandell v. Jackson County*, 115 F.R.D. 333 (S.D. Ill. 1987). The *Williams* court "respectfully disagreed" with the Seventh Circuit's opinion in *Strandell*, finding that the district court opinion in *Strandell* expresses "the better view" on the court's authority to order summary jury trial. Williams expressed support for the view that even where there is no local rule expressly providing for the use of summary jury trials, requiring the procedure would be properly within the court's discretion, for the reasons given by the district court in *Strandell*.

TECHNOLOGY, from page 5

plementation of records-replacement electronic docketing systems examine the federal software before proceeding with their own development. Demonstrations of the appellate (New AIMS) and district court (CIVIL) versions of the software were provided to interested attendees using the computer and courtroom facilities at the federal courthouse in Denver. Almost 100 persons attended the demonstrations of the federal case management systems.

Over 30 vendors were represented at the conference, who demonstrated the latest technology for the courts, ranging from case management and other computer software systems to electronic scanners and video conferencing systems. ■

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Courts of Appeals Adopting Rules and Procedures for Sentencing Appeals

A number of the courts of appeals ave adopted special rules or speci- ed in their internal operating proce- ures or in "notices to counsel" the rocedures to be followed in appeal- g sentences under the guideline ntencing system. Other appeals urts are presently handling such peals under their existing proce- ures, with the option of implement- g special rules or procedures at a ter time.

Docketing statements and trans- ittal sheets. Some appeals courts ave adopted new criminal appellate ocketing statements, which are to be ed in the clerk's office of the ap- eals court at the same time as or ortly after the notice of appeal is ed in the district court. These state- ents assist the appeals courts in entifying cases under the guidelines d the issues raised on appeal. For ample, the docketing statement lopted by the Eleventh Circuit re- ires counsel to indicate whether the peal challenges the conviction, the ntence, or both. Where the appeal allenges the sentence, or the convic- n and sentence, counsel in the eventh Circuit indicate whether the ppellant claims errors in the district court's findings of fact or in its application of the guidelines. Counsel must show on the docketing statement which guidelines the district court applied and which guidelines the appellant contends the court should have applied. These designations by counsel generally track the language of 18 U.S.C. § 3742(d), which specifies the standard for reviewing guideline sentences. (A proposed amendment to this and other sections of the sentencing statute is contained in S. 2485, a bill recently passed by the Senate. See story on legislation, p. 5). Some courts' docketing statements already required the parties to set forth the issues that will be raised on appeal; these statements have not been modified. The Fourth Circuit, for example, did not amend its docketing statement, but in order to help the appeals court identify pre- and post-guidelines cases, it amended the transmittal sheet that is completed by the district court staff when the notice of appeal is transmitted to the court of appeals.

Expedited appeals. Some appeals courts have adopted rules or procedures permitting counsel to move for an expedited appeal where there is a risk that a short sentence would already have been served before the ordinary appeals process had run its course. For example, the Eleventh Circuit's "Notice Concerning Appeals from Criminal Convictions" informs counsel that appeals from sentences or from convictions and sentences pursuant to 18 U.S.C. § 3742 "will generally proceed in the same manner as other appeals and will not automatically be expedited or given preference." However, when the appeal is only from the sentence imposed, "the court will consider impo-

See APPELLATE RULES, page 2

FJC Announces Seminar for District Judges

Judge John C. Godbold, FJC Director, has announced that a seminar for newly appointed district judges will be held in Washington, D.C., starting Nov. 28 and concluding Dec. 2, 1988. All sessions will be at Dolley Madison House, the Center's headquarters.

A reception for the new judges and their families is scheduled for Sunday, Nov. 27, and a dinner will be held at the Supreme Court on Nov. 30.

Sup. Court to Consider Constitutionality of Guidelines Next Term

On June 13 the Supreme Court granted the Solicitor General's and the defendant's petitions for writs of certiorari before judgment in a case raising the issue of the constitutionality of the Sentencing Guidelines. *U.S. v. Mistretta*, No. 87-1904, *Mistretta v. U.S.*, No. 87-7028. The defendant in the case pled guilty but challenged the constitutionality of the guidelines on delegation and separation of powers grounds. The district court upheld the constitutionality of the guidelines. *U.S. v. Mistretta*, 682 F. Supp. 1033 (W.D. Mo. 1988).

The Solicitor General's petition noted the split among the district courts that have decided the issue. Until the Supreme Court resolves the constitutionality issue, the petition said, Congress's intent to avoid unwarranted sentencing disparity "will be frustrated as individual district judges independently decide whether to sentence defendants under the pre- or post-Act sentencing system."

The petitions for certiorari identify the questions presented by the case as whether the Sentencing Guidelines are invalid because the Sentencing Commission is constituted in violation of separation of powers principles; whether they are invalid because the Sentencing Reform Act of 1984 improperly delegates legislative authority to the Sentencing Commission; and whether, if they are invalid, the 1984 amendments to the statutes

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Effect of Guidelines on Pretrial Services Weighed ..... p. 3

APPELLATE RULES, from page 1
sition by the lower court of a 'short' sentence of incarceration or probation (under six months in duration) as a basis for expedited consideration provided that appellant otherwise demonstrates that he will be injured if the appeal is not expedited." The appellant should seek expedited consideration by motion after filing the notice of appeal, but "[p]arties are cautioned that the court disfavors bifurcation of issues concerning sentencing from those concerning conviction and generally will consider all issues on appeal together."

Similarly, in the Sixth Circuit the bifurcation of verdict and sentence appeals will be discouraged. Where separate appeals are filed from the conviction and sentence, they will be consolidated and processed as a single unit, with the exception of appeals that challenge sentences of incarceration of less than one year. Such cases will be closely proctored in the clerk's office to ensure an accelerated disposition.

In the D.C. Circuit, expedited treatment will be given to appeals from sentences for a term of eight months or less where the defendant is in custody pursuant to the sentence appealed; such expedited appeals from the sentence imposed will be heard separately from the appeal of the underlying merits in the D.C. Circuit.

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

The Fifth Circuit's rule governing appeals raising Sentencing Guidelines issues provides that if the appeal is from the sentence only, the docketing statement will serve as the brief on appeal unless the appellant elects otherwise.

The rule adopted in the Tenth Circuit provides that where the sentence is less than one year and neither probation nor release pending appeal is granted, the appellant may move for an expedited appeal. The Tenth Circuit's docketing statement is designed to permit this motion to be made on the docketing statement itself by affirmatively responding to one of the questions on the statement.

Preparation of the transcript of the sentencing hearing. 18 U.S.C. § 3553(c) requires the court at the time of sentencing to state the reasons for its imposition of the particular sentence and to state its reasons for departing from the guidelines if this is done. The relevant district court proceedings, such as the sentencing hearing, must be transcribed and made part of the record on appeal. Under the regular procedures in the Third Circuit, transcripts in criminal appeals are required to be filed within 30 days of the completion of the transcript purchase order. Adhering to this 30-day time period would delay an expedited case, so the Third Circuit's Judicial Council entered an order authorizing the clerk of the court of appeals to enter any order appropriate to ensure expedited transcription. Under the Judicial Council's order, the clerk of the court of appeals can order court reporters to give priority to the transcript of the sentencing proceeding. This order would require the completion of the pertinent transcripts within 14 days, the filing of appellant's brief within 14 days of the filing of transcripts, the filing of appellee's brief within 14 days of appellant's brief, the filing of any reply brief within 14 days of appellant's brief, and the filing of any reply brief 10 days thereafter. Similarly, the Sixth Circuit's internal operating procedures now provide that the court of appeals may direct the preparation of a transcript "out of the order otherwise prescribed by rule."

Presentence report. Under the pre-guideline system, the presentence report was not included in the record on appeal unless the presentence report was at issue. Section 3742(c)(2) of 18 U.S.C. now requires it to be included in the record whenever a criminal appeal includes a challenge to the guidelines sentence. Some local rules of the district courts do not specify whether copying of the presentence report is permitted, and some local rules prohibit the copying of the presentence report. In some circuits, the presentence report must be transmitted under seal from the district court to the court of appeals. For example, internal operating procedures adopted in the Sixth Circuit provide that both the presentence report and any objections to it shall be placed under seal by the district court and forwarded to the court of appeals, "which shall maintain the seal." Review of these documents by the court of appeals is conducted in an in camera manner "to ensure the confidentiality of the report, and no copying or viewing by counsel shall be had except by order of the court." The Fifth Circuit's "Rule Governing Appeals Raising Sentencing Guidelines Issues" provides that the presentence report transmitted to the court of appeals "shall be transmitted separately from other parts of the record on appeal and shall be labeled as a sealed record if sealed by the district court." Presentence reports filed in the Fifth Circuit as part of a record on appeal "will be treated as matters of public record except to the extent that the report . . . has been sealed by order of the district court." Counsel may file a motion for access to sealed presentence reports in the Fifth Circuit; if the motion is granted, counsel may not duplicate the report, and must return it to the court.

Active Article III Judges Surveyed on Salaries, Other Issues by Judicial Conference Committee

The Judicial Conference Committee on the Judicial Branch, chaired by Judge Frank M. Coffin (1st Cir.), has surveyed federal judges concerning their length of service, their attitudes toward their office, their compensation, and the considerations entering into their choice to accept a judgeship. The anonymous responses to the survey questionnaire will be tabulated and the results presented to the 1988 Commission on Executive, Legislative, and Judicial Salaries.

The survey, which was sent to all 710 active Article III judges, was conducted with the assistance of the Office of the General Counsel of the Administrative Office of the U.S. Courts. More than 600 responses had been received by mid-June. ■

Judge Joseph Hatchett (11th Cir.), chairman of the Judicial Conference's Magistrates Committee, and three U.S. magistrates met recently with the Chief Justice to discuss items of mutual interest concerning the operation of the federal magistrate system. From left, John Thomas Jones, Chief, Division of Magistrates, AO; Harvey E. Schlesinger, U.S. Magistrate, M.D. Fla. (Jacksonville); John Paul Godich, U.S. Magistrate, S.D. Ind. (Indianapolis); Judge Hatchett; Ila Jeanne Sensenich, U.S. Magistrate, W.D. Pa. (Pittsburgh).

Guidelines' Effect on Pretrial Services Under Consideration by JCUS Subcommittee

Pursuant to a recommendation of the Subcommittee on Pretrial Services of the Judicial Conference's Criminal Law and Probation Committee, the pretrial services "advice of rights" form was provisionally amended earlier this year in light of the Sentencing Guidelines. The Subcommittee has considered the overall impact of the guidelines on the implementation of the Pretrial Services Act of 1982, and will make further recommendations in the near future.

The "advice of rights" form signed by defendants at the time of pretrial services interviews was amended because of the possibility that information disclosed by a defendant during such an interview may later be used in the computation of the defendant's sentence under the sentencing guidelines system. The amended form now includes the language, "In the event I am found guilty, the information I provide will be made available to a U.S. Probation Officer for the purpose of preparing a presentence report and may affect my sentence."

Information provided during pretrial services interviews is used by the court to determine whether and under what conditions a defendant will be released or detained pending trial. Such information is not used against defendants on the issue of guilt in any judicial proceeding (except prosecutions for perjury or false statements made in the course of obtaining release and prosecutions for failure to appear at the criminal proceeding for which pretrial release was granted).

Under the Sentencing Guidelines, information disclosed during a pretrial services interview pertaining to the defendant's drug use, prior criminal history, and financial data could become part of a guideline computation. For certain offenses, such as property crimes, tax crimes, fraud, and drug crimes, the guidelines that apply are determined with reference to the quantity of money or drugs involved in the case. Behavior that was not included in the offense of conviction or even in the charging

See PRETRIAL, page 8

Updated FJC Study of Issues in Job Bias Cases Released

The FJC has published *Major Issues in the Federal Law of Employment Discrimination* (2d ed.) by Professor George Rutherglen of the University of Virginia School of Law. An update of Professor Rutherglen's previous monograph for the Center, the book is in three sections. The first two sections survey the substantive and procedural provisions of title VII of the Civil Rights Act of 1964; the third discusses other federal remedies for employment discrimination. The book also includes an annotated bibliography of books, articles, and student comments and notes on the subject.

Copies of the monograph may be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (8 oz.). Do not send an envelope.

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A Survey of State Judicial Fringe Benefits. ABA, Judicial Administration Division (1988).

Crump, Susan. "Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?" 66 *North Carolina L. Rev.* 239 (1988).

Dunn, Mark T. "Chapter 12 of the U.S. Bankruptcy Code: Recent Issues and Cases." 76 *Illinois Bar J.* 376 (1988).

Easterbrook, Frank H. "The Role of Original Intent in Statutory Construction." 11 *Harvard J. of Law & Public Policy* 59 (1988).

Edwards, Harry T. "The Future of Affirmative Action in Employment." 44 *Washington & Lee L. Rev.* 763 (1987).

"Essays on the Supreme Court Appointment Process." 101 *Harvard L. Rev.* 1146 (1988).

Furlow, David A., and Charles W. Kelly. "Removal and Remand: When Does a Federal District Court Lose Jurisdiction Over a Case Remanded to State Court?" 41 *Southwestern L.J.* 999 (1987).

Garner, Joel H. "Delay Reduction in the Federal Courts: Rule 50(b) and th Federal Speedy Trial Act of 1974." 3 *J. of Quantitative Criminology* 229 (1987).

Ginsburg, Douglas H. "The Appropriate Role of the Antitrust Enforcement Agencies." 9 *Cardozo L. Rev* 1277 (1988).

Grunin, Susan Krup, and Jud Watkins. "The Investigative Role of the United States Probation Officer Under Sentencing Guidelines." 51 *Federa Probation* 43 (Dec. 1987).

Jensen, Erik M. "Monroe G. McKay and American Indian Law: In Hono of Judge McKay's Tenth Anniversary on the Federal Bench." 1987 *Brigham Young University L. Rev.* 1103.

Komesar, Neil K. "A Job for th Judges: The Judiciary and th Constitution in a Massive and Com plex Society." 86 *Michigan L. Rev.* 65 (1988).

Kozinski, Alex, and J. D. William "It Is a Constitution We Are Ex pounding: A Debate." 1987 *Utah Rev.* 977.

Marshall, Thurgood. "Th Constitution: A Living Document 30 *Howard L.J.* 623 (1987).

Mosk, Stanley. "The Common La and the Judicial Decision-Makin Process." 11 *Harvard J. of Law & Publ Policy* 35 (1988).

Motley, Constance Baker. "Massiv Resistance: America's Second Civ War." 41 *Arkansas L. Rev.* 123 (1988

Parness, Jeffrey A. "More Stringe Sanctions Under Federal Civil Ru 11: A Reply to Professor Nelken." *Georgetown L.J.* 1937 (1987).

Practitioner's Handbook for Appeals the United States Court of Appeals f the Seventh Circuit (1988).

Sloviter, Dolores K. "Perceptions the Legal Profession."10 *Western N England L. Rev.* 175 (1988).

Wasby, Stephen L. "Technolo and Communication in a Feder Court: The Ninth Circuit." 28 *San Clara L. Rev.* 1 (1988).

Weaver, George M. "The Precede tial Value of Unpublished Judic Opinions." 39 *Mercer L. Rev.* 4 (1988).

PERSONNEL

CIRCUIT JUDGES

Nominations
Richard L. Nygaard, 3d Cir., May 25

Appointments
Paul R. Michel, Fed. Cir., Mar. 8
Wade Brorby, 10th Cir., Mar. 31
Stephen Trott, 9th Cir., Apr. 19

Elevations
Alfred T. Goodwin, Chief Judge, 9th Cir., June 15

Death
Oscar H. Davis, Fed. Cir., June 19

DISTRICT JUDGES

Nominations
Herbert J. Hutton, E.D. Pa., May 17
Robert P. Patterson, Jr., S.D.N.Y., June 14
Robert C. Bonner, C.D. Cal., June 15
Adriane J. Dudley, D. V.I., June 20
Lewis T. Babcock, D. Colo., June 23
Melinda Harmon, S.D. Tex., June 23

Confirmations
David A. Ezra, D. Haw., May 19
John C. Lifland, D.N.J., May 19
William G. Cambridge, D. Neb., May 27
Richard A. Schell, E.D. Tex., May 27

Appointments
Kenneth Conboy, S.D.N.Y., Feb. 3
Edward F. Harrington, D. Mass., Feb. 29
Rudy Lozano, N.D. Ind., Mar. 27
Paul Niemeyer, D. Md., Mar. 31
Kenneth M. Hoyt, S.D. Tex., Apr. 12
Thomas Zilly, W.D. Wash., Apr. 30
Lowell Reed, E.D. Pa., May 6
Jack T. Camp, N.D. Ga., May 27
Richard Arcara, W.D.N.Y., June 1
Bernard Friedman, E.D. Mich., June 1

Elevations
Harold L. Ryan, Chief Judge, D. Idaho, May 2
David V. O'Brien, Chief Judge, D.V.I., May 15
Neal P. McCurn, Chief Judge, N.D.N.Y., June 30

Senior Status
G. Wix Unthank, E.D. Ky., June 14

Deaths
Jack Roberts, W.D. Tex., Feb. 27
Lloyd H. Burke, N.D. Cal., Mar. 15
Valdemar A. Cordova, D. Ariz., June 18

BANKRUPTCY JUDGES

Appointments
Mitchel R. Goldberg, C.D. Cal., June 1
Randall J. Newsome, N.D. Cal., June 1
Marilyn Morgan, N.D. Cal., June 16

President Signs Supreme Court Docket Bill; Congress Considers Government Pay Raise

Congress has taken action this summer on legislation concerning the Supreme Court's discretion over its appellate docket, salary increases, a new building for the judiciary in Washington, and other matters of interest to the judiciary.

• S. 952, a bill to abolish the Supreme Court's mandatory appellate jurisdiction, was passed by the House and Senate and signed by President Reagan. Chief Justice Rehnquist, in a letter to Rep. Robert W. Kastenmeier (D-Wis.) dated May 11, 1988, thanked Rep. Kastenmeier for his role in expediting the bill's passage. Rep. Kastenmeier chairs the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The Chief Justice in his letter characterized the effective elimination of the Supreme Court's mandatory jurisdiction that S. 952 would provide as "the primary legislative goal of the Court."

• As part of its general governmental appropriations bill, the House voted a 4 percent pay raise for federal government employees, but the raise would not apply to high-level executives or judges. The Senate has approved a 4 percent raise that would include the executives and judges. A conference committee will now take up the matter.

• S. 1934, to provide for a building for agencies of the judiciary and retired Supreme Court Justices in Washington, D.C. (see *The Third Branch*, June 1988, at 6), passed the Senate. The bill authorizes the Architect of the Capitol and a commission representing the Supreme Court, House, and Senate to oversee a design competition for the building, to select the successful bidder, and to enter into an agreement to construct the building. The bill as passed provides that the judiciary will initially occupy about two-thirds of the building, with plans to occupy more space as time passes. The remaining space will be offered first to other federal government tenants (other than congressional committee staff or the personal staff of Senators and Representatives). Only if there are insufficient government tenants will space be offered to private tenants.

The 12-member commission responsible for supervising the design, construction, maintenance, and security of the building will include two persons to be appointed by the Chief Justice from among the Justices of the Supreme Court and federal judges. The commission will also include members of the House Office Building Commission (or their designees); the majority leader and minority leader of the Senate (or their designees); the chairman and ranking minority member of the Senate Committee on Rules and Administration (or their designees); the chairman and ranking minority member of the Senate Committee on Environment and Public Works (or their designees); and the chairman and ranking minority member of the House Committee on Public Works and Transportation (or their designees).

• H.R. 3152, the omnibus or "housekeeping" bill containing numerous provisions called for by the Judicial Conference of the United States (see *The Third Branch*, June 1988, at 2) was reintroduced as a new bill, H.R. 4807.

• S. 2485, the Minor and Technical Criminal Law Amendments Act of 1988, was passed by the Senate. Title I of the bill would make numerous corrections to existing criminal statutes. One section would create three additional RICO predicates: murder-for-hire; sexual exploitation of children; and fraud in connection with credit cards, electronic banking cards, and similar "access devices." Other sections of title I would permit Federal Prison Industries, Inc., to borrow funds from the Treasury to finance capital expansion; would increase the penalty for possession of explosives in a federal building; and would amend Fed. R. Crim. P. 11(c) to require a federal district court, before accepting a plea of guilty or nolo contendere, to advise the defendant of the possible imposition of a period of supervised release after imprisonment (as authorized by 18 U.S.C. § 3583) effective as to crimes committed on or after Nov. 1, 1987. Rule 11 currently requires advice as to the effect of any possible term of special parole.

Title II of the bill, the Ancillary Debt Collection Amendments Act of 1988, is intended to be a supplement to the Debt Collection Act, which was previously introduced as S. 1961 (see *The Third Branch*, February 1988, at 4).

Title III of S. 2485 would amend 18 U.S.C. pertaining to sentencing procedures under the Sentencing Guidelines. Section 311 of title III would

See LEGISLATION, page 6

CALENDAR

June 30-July 2 Fourth Circuit Judicial Conference
July 6-8 Tenth Circuit Judicial Conference
July 6-9 Sixth Circuit Judicial Conference
July 7-8 Judicial Conference Advisory Committee on Bankruptcy Rules
July 11-15 Orientation Seminar for New Probation & Pretrial Officers
July 14-17 Eighth Circuit Judicial Conference
July 17-20 Judicial Conference Committee on Judicial Ethics
July 17-30 National Criminal Defense College Trial Practice Institute, Sess. II
July 18-19 Judicial Conference Committee on Rules of Practice and Procedure
July 18-19 Judicial Conference Committee on Codes of Conduct
July 25-27 Workshop for Administrative Managers
July 28-29 Judicial Conference Committee on the Bicentennial of the Constitution
July 29-30 Judicial Conference Committee on the Budget
Aug. 1-5 Orientation Seminar for New Probation/Pretrial Officers

NOTEWORTHY

Marshal properly removed from office; office not "quasi-judicial." The fact that the judiciary benefits from the law enforcement activities of U.S. marshals does not make their office quasi-judicial and limit the President's plenary power to remove them from office, the Third Circuit has held. *Chabal v. Reagan*, 841 F.2d 1216 (3d Cir. 1988). A marshal was removed from office by the President. He brought suit against the United States, President Reagan, the Department of Justice, the U.S. Marshals Service, and several other federal officials. He alleged that the President had removed him in violation of the First and Fifth Amendments and sought declaratory relief, reinstatement, back pay, and damages. After remand from the court of appeals, the district court transferred one of the plaintiff's claims for money damages to the U.S. Claims Court and dismissed the remaining claims for failure to state a claim on which relief can be granted. *Chabal v. Reagan*, 633 F. Supp. 1061 (M.D. Pa. 1986). On appeal, the Third Circuit affirmed, observing that officers exercising purely executive powers are removable at will by the President. The marshal claimed that because marshals provide a variety of services for the judiciary, some of them arguably essential to the functioning of the courts, the office of marshal is not merely executive but quasi-judicial as well, and that this limits the President's removal power. The court of appeals rejected this argument, stating that it "confuses the question of who benefits from the marshals' law enforcement activities with the question of whether those activities involve executive power." 841 F.2d at 1221. The conclusion that Congress has not attempted to restrict the President's removal power is reinforced by Congress's express decision to subject marshals to the supervision and direction of the Attorney General, the court noted.

D.C. Cir. upholds constitutionality of Federal Salary Act. The 1967 act that established the Commission on Executive, Legislative, and Judicial Salaries is constitutional, the D. C. Court of Appeals has ruled. *Humphrey v. Baker*, No. 87-5310 (D.C. Cir. May 31, 1988). The law had been challenged on separation of powers and other grounds by several members of Congress (see *The Third Branch*, May 1987, at 6).

Bureau of Justice Statistics reports comprehensive data on crime. The Justice Department's Bureau of Justice Statistics has released a comprehensive report on crime, *Report to the Nation on Crime and Justice*. According to the report, in 1985 violence or theft touched about one fourth of all American households. A violent crime by strangers or a burglary struck 8 percent of all households in 1985. The chance of being a victim of a violent crime, with or without injury, is greater than that of being hurt in a traffic accident. More than 1.5 percent of the adult population in the United States is under some form of correctional sanction, but three out of four adults under correctional care or custody are not incarcerated. Over the past several years, probation populations have increased by more than 18 percent, compared with about 15 percent in jail and prison populations and nearly 13 percent in the number of parolees. ■

LEGISLATION, from page 5

clarify language in 18 U.S.C. that imposed certain recordkeeping requirements on trial courts. Under 18 U.S.C. § 3553(c), a court must state "the reasons" for its imposition of a particular sentence, and a transcript of every statement of reasons must be prepared and transmitted to the Probation Service and, where a term of imprisonment is imposed, to the Bureau of Prisons. An analysis of S. 2485 provided by Sen. Robert Byrd (D-W.Va.) concluded that the present statutory requirement that transcripts be prepared in every case "places a tremendous burden on court personnel, especially court reporters. The requirement may impede the efficient preparation and transmittal of transcripts in those cases in which transcripts would be valuable . . . ." Thus, under § 311 of the bill, the sentencing court would still be required to state publicly the reasons for imposing a particular sentence, and the statement of reasons would still be transmitted to the appropriate agencies. The amendment would permit the court to determine whether a transcript is the most suitable form of transmittal in a particular case, or if a different form of transmittal is appropriate.

Section 312 of title III would clarify 18 U.S.C. § 3742, *Appellate Review of Sentences*. One provision of § 312 would specify the standard to be applied by the court of appeals in reviewing the district court's determination of mixed questions of law and fact.

Another provision of title III addresses a concern related to the time limits for appeals set forth in Fed. R. App. P. 4(b). Rule 4(b) provides that in a criminal case a defendant has 10 days in which to file an appeal and the government has 30 days. In both cases the time period runs from the entry of the judgment. A defendant who received a light sentence could allow the 10-day period to lapse without filing an appeal, only to find that the government later chose to file an appeal within its 30-day limit. In such a case a defendant would be foreclosed from filing a cross-appeal. The amendment proposed by § 320 would permit either party to start counting the period for filing an appeal on the day an appeal is filed by the opposing party.

• H.R. 2182 passed the House on June 22 and is pending before the Senate Judiciary Committee. One title

See LEGISLATION, page 7

LEGISLATION, from page 6

of the bill would revise the procedure by which amendments to federal rules are drafted and take effect, and is intended to increase participation in the rulemaking process by all segments of the bench and bar (see detailed description in *The Third Branch*, August 1987, at 3).

• S. 2455, a bill that would authorize the death penalty in drug-related killings, was passed by the Senate June 10. S. 2455 is based on provisions of two previously introduced bills: S. 2206, Senator Alfonse M. D'Amato's bill to provide the death penalty for the murder of a law enforcement officer and for "drug kingpins" who order the killing of any individual; and S. 2251, the Law Enforcement Officers' Protection Act, introduced by Sen. Pete Wilson (R-Cal.), to provide the death penalty for the killing of any law enforcement officer or corrections officer involved in drug law enforcement (see *The Third Branch*, June 1988, at 2). S. 2455 would provide for the possible imposition of the death penalty on the killers of judges and prosecutors as well as law enforcement and corrections officers.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice marked up H.R. 4021, the Federal Prison Industries Reform Act of 1988 (see *The Third Branch*, April 1988, at 7). The bill would permit Federal Prison Industries, Inc., to borrow from the Treasury.

• The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, chaired by Rep. Don Edwards (D-Cal.), held hearings in the inquiry into the conduct of Judge Walter L. Nixon, Jr. (S.D. Miss.). Rep. Peter W. Rodino, Jr. (D-N.J.) had introduced H. Res. 407, calling for the impeachment of Judge Nixon, on Mar. 17, 1988, following certification by the Judicial Conference of the United States that Judge Nixon had engaged in conduct that might constitute grounds for impeachment (see *The Third Branch*, April 1988, at 1). Judge Nixon was convicted of two counts of perjury in the Southern District of Mississippi.

• In the matter of the resolution calling for the impeachment of Judge Alcee L. Hastings, the House Judiciary Committee's Subcommittee on Criminal Justice concluded its hearings. Judge Hastings was found not guilty in 1983 on charges of conspiring to receive a bribe. After an investigation by the Investigating Committee of the Judicial Council of the Eleventh Circuit, the Circuit Judicial Council certified to the Judicial Conference of the United States that Judge Hastings had "engaged in conduct which might constitute grounds for impeachment." The Judicial Conference in March 1987 certified to the Speaker of the House that "consideration of impeachment may be warranted" (see *The Third Branch*, April 1987, at 5).

• H.R. 1212, a bill limiting polygraph use by forbidding private employers to use such tests in preemployment testing of job applicants and setting certain restrictions on the testing of employees, was cleared for signature by the President. H.R. 1212, as passed, incorporated S. 1904 and represents a compromise with the Senate on some issues. The bill does

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Positions Available

Clerk, E.D. Tenn., Knoxville. Salary $54,907-$71,377. Requires minimum 10 years' progressively responsible administrative experience in public service or business, at least 3 in position of substantial management responsibility; thorough understanding of court management. Attorneys in active practice of law in public or private sector may substitute active practice on a year-for-year basis for experience requirement. Education may be substituted for experience on following basis: bachelor's degree for 3 years; postgraduate degree in public, business, or judicial administration for 1 additional year. Law degree may be considered as qualifying for 2 additional years' experience. Law degree, legal practice, and training or experience in judicial administration highly desirable. Send 4 copies of cover letter and resume by Sept. 15 to Chief Judge Thomas G. Hull, Room 221, U.S. Courthouse, 101 Summer St. W., Greeneville, TN 37743.

Chief Deputy Clerk, U.S. Bankruptcy Court, N.D. Ga., Atlanta. Salary from $27,716-$54,907, depending on experience. Serves as office manager; responsible to clerk for administration and supervision of office. Must be high school graduate or equivalent and have 3 years' progressively responsible general experience (administrative, professional, investigative, technical, or other) and 3 years' progressively responsible specialized experience in administrative, supervisory, managerial, or professional work. Open until filled. Submit resume or typed SF171 to Clerk, U.S. Bankruptcy Court, 1340 U.S. Courthouse, 75 Spring Street, S.W. Atlanta, GA 30303, Attention: Linda Cooke, marked "Confidential."

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United States District Court Northern District of Ohio

Judge Robert E. Ginsberg
United States Bankruptcy Court Northern District of Illinois

L. Ralph Mecham, Director
Administrative Office of the United States Courts

Federal Judicial Center
Judge John C. Godbold, Director
Charles W. Nihan, Deputy Director

PRETRIAL, from page 3

document can be taken into account in applying the guidelines. For example, if a defendant is convicted of a drug trafficking offense, all evidence of drug sales or usage—such as admissions made during a pretrial services interview or to a probation officer about how heavy the defendant's drug use had been over a certain period of time—could be factored in.

In addition, one of the factors determining the applicable guideline range is the defendant's conviction record as a juvenile or adult. Prior criminal history information volunteered by the defendant but not appearing in official records—such as an admission of a conviction that the probation officer would not otherwise be aware of—could thus conceivably affect the defendant's sentence.

Similarly, Section 4B1.3 of the Sentencing Guidelines, the "criminal livelihood" provision, in essence prohibits probation for an individual convicted of an offense that was part of a "pattern of criminal conduct from which he derived a substantial portion of his income." A defendant's statements about his or her finances made during the pretrial interview could be used in assessing whether this provision applies.

In light of the Sentencing Guidelines, some defense attorneys have advised clients against answering certain pretrial services questions, while others have advised against answering any questions. ■

LEGISLATION, from page 7

not apply to governmental employers or to employers offering security services. In cases involving economic loss, tests could be administered to employees with access to lost property and to those whom the employer reasonably suspects of theft. The bill establishes a civil penalty of up to $10,000 for violations.

• Sen. Rudy Boschwitz (R-Minn.) introduced S. 2428, to amend title VII of the Civil Rights Act of 1964 to prohibit employment discrimination in the legislative or judicial branches of government, which are not covered by the act. The bill is a companion measure to the previously introduced H.R. 4576 (see *The Third Branch*, June 1988, at 2). ■

GUIDELINES, from page 1

governing parole and "good time" credits are severable and thus should apply to defendants sentenced for crimes committed after Nov. 1, 1987.

The Solicitor General's petition also noted that the longer the question of the constitutionality of the guidelines remains unsettled, the greater will be the number of defendants who may have to be resentenced. The Sentencing Commission has estimated that the costs of resentencing to the federal courts, the U.S. Attorneys' offices, counsel appointed under the Criminal Justice Act, the U.S. Marshals Service, and the Probation Service will be millions of dollars. The Solicitor General's petition also noted the impact resentencing hearings will have on district court calendars.

Appeals raising the constitutionality issue have been filed in all of the regional circuit courts of appeals except the First and D.C. Circuits. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

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Magistrates' and Bankruptcy Judges' Retirement and Survivors Bill Closer to Passage

A bill to provide enhanced retirement and survivors' annuities for bankruptcy judges and magistrates, H.R. 4340, was passed by the House July 11. The same day, the House amended S. 1630, the Senate version of the bill, to contain the language of H.R. 4340 as passed, and passed S. 1630. The bill will now be taken up by a House-Senate conference.

Two bills to provide enhanced retirement and survivors' annuities were introduced in 1987—H.R. 2586, by Rep. Robert W. Kastenmeier (D-Wis.), and S. 1630, by Sen. Howell T. Heflin (D-Ala.). Representatives of the Judicial Conference of the United States testified at congressional hearings in support of those bills (see *The Third Branch*, December 1987, at 1). The bills as originally introduced would not have required contributions by the bankruptcy judges or magistrates; the House version was later amended to require contributions and reintroduced as H.R. 4340; the Senate version passed in its original form (see *The Third Branch*, April 1988, at 3).

The bill as passed by the House July 11 would require contributions of 3 percent of salary by bankruptcy judges or magistrates; would vest full retirement benefits after 15 years; and would provide that retirement benefits are to equal 100 percent of the bankruptcy judge's or magistrate's salary, but that an individual who leaves office before age 65 has his or her pension reduced by 2 percent per year for each year under 65 he or she was at the time of leaving office. The bill would provide that cost-of-living increases shall not be paid to those retired magistrates and bankruptcy judges who are practicing law and thus not eligible for recall to judicial service. Annuities for retirees with 8-14 years of service would be computed proportionally by dividing the years of service by 14, and would be payable at age 65 for life. The bill would also permit bankruptcy judges and magistrates to participate in the Judicial Survivors' Annuity System (JSAS).

Rep. Kastenmeier, presenting what he termed the "fiscally realistic package" of H.R. 4340, stated that

See LEGISLATION, page 4

Rep. Carlos J. Moorhead (R-Cal.), Chief Judge Charles Clark (5th Cir.), and Chief Justice Rehnquist at a reception at the Supreme Court to mark the signing into law by President Reagan on June 27 of S. 952 (Pub. L. 100-352), giving the Supreme Court more control over its docket through greater discretion in selecting the cases it will review. More photographs on pages 4-5.

Bankruptcy Courts in Three Districts Use Computer-Synthesized Voice System for Calls

Bankruptcy courts in three federal districts are now able to answer telephone inquiries for case information by means of a new computer service, the Voice Case Information System (VCIS), a computer-generated synthesized voice that answers callers' questions. Personnel from the FJC's Innovations and Systems Development Division installed VCIS this summer in the Western District of Washington (which includes Seattle and Takoma), the Western District of New York (which includes Buffalo and Rochester), and the Western District of Texas (which includes San Antonio and Austin).

Callers dial the special VCIS telephone number, using any touch-tone telephone, and enter the name of an individual or organization. Names are entered by pressing the telephone keys that correspond to the letters in the debtor's or party's name. The caller then presses the "pound" key ("#") to indicate that the name has been entered. The voice synthesizer responds a few seconds later with such information as the case number; which chapter of the Bankruptcy Code is the basis for jurisdiction; the debtors' names (and if an adversary proceeding, names of principal adversaries); the debtor's attorney's name, telephone number (if avail-

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Inside . . .

ABA, AO Hold Death Penalty Resource Conference . . . . . p. 3

D.C. and Third Circuit Courts of Appeals Appoint Circuit Executives . . . . . p. 3

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VOICE SYSTEM, from page 1
able), or city; the trustee's name; the presiding judge's name; the case status; the date and location of the 341 creditor meeting (if available); and the discharge and closing dates. All updates to existing cases are instantaneously available upon entry by court personnel. The system is accessible seven days a week.

VCIS saves staff time and offers an inexpensive way to obtain case information. There is no charge to callers for using the service. The number of calls to the VCIS systems in the Western District of Washington and the Western District of Texas has been averaging over 400 per day. Charles W. Vagner, Clerk of the Western District of Texas, said that use of VCIS has reduced calls for bankruptcy information taken by staff by "more than half," and that the calls the staff has continued to receive are now referred to the new number, so that a further reduction in calls is expected. Lewis P. Stephenson, Bankruptcy Clerk in the Western District of Washington, said, "Thus far the results have been most promising in giving better public access to bankruptcy information. The system has significantly reduced the time spent by the court phone receptionist in anwering these routine calls and allowed a more thorough response to non-routine calls."

VCIS operates as part of the BANCAP software package developed by the Center for use by the bankruptcy courts. BANCAP is part of the Integrated Case Management System (ICMS) developed by the Center. ICMS also includes the CIVIL program, used by the district courts, and NewAIMS, used by the appellate courts. For more information about VCIS, call Michael Greenwood or John Hillenbrand of the Center's Innovations and Systems Development Division at (202) 633-6400.

The Center will further evaluate and refine this service for the remainder of 1988. Over time, VCIS may be made available to other bankruptcy courts installing the BANCAP system.

VCIS is the first of several technologies the Center is evaluating that may improve public access to court information. Future issues of *The Third Branch* will describe the Center's evaluation of other useful technologies such as dial-in access to information, electronic bulletin boards, touch-screen information access by court visitors, and electronic filing of documents. ■

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

August 1988

PERSONNEL

CIRCUIT JUDGES

Nominations

John M. Duhe, Jr., 5th Cir., June 28
Jacques L. Wiener, Jr., 5th Cir., June 28

DISTRICT JUDGES

Nominations

Marvin J. Garbis, D. Md., July 6

Appointment

Lowell A. Reed, E.D. Pa., May 6

Senior Status

Daniel H. Huyett III, E.D. Pa., May 1

BANKRUPTCY JUDGE

Appointment

Bernice B. Donald, W.D. Tenn., June 27

MAGISTRATES (FULL-TIME)

Appointment

John W. Primomo, W.D. Tex., July 18
Deborah A. Robinson, D.D.C., July 18

Retirement

Jamie C. Boyd, W.D. Tex., June 30

CALENDAR

Aug. 1-5 Orientation Seminar for New Probation and Pretrial Officers
Aug. 15-17 Workshop for Case Managers
Aug. 15-19 Seminar for Chief Probation and Pretrial Clerks
Aug. 16-19 Ninth Circuit Judicial Conference
Aug. 17-19 Seminar for Magistrates of the Fifth and Eleventh Circuits
Aug. 21-23 Workshop for Problem-Solving
Aug. 22-26 Supervisory Skills Seminar

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ABA, Administrative Office's Defender Services Division Hold Death Penalty Conference

A national death penalty resource planning conference, intended to help develop permanent ways of ensuring effective representation in postconviction capital cases, was held recently in Oakland, Cal. The conference was presented by the ABA's Postconviction Death Penalty Representation Project in cooperation with the Administrative Office's Defender Services Division.

Approximately 125 judges, professors, practitioners, and other interested persons from the federal court system and from states with the death penalty shared specific information and guidance on the development, funding, and implementation of death penalty resource centers and other sources of support. The Judicial Conference of the United States has determined that funding can be made available under the Criminal Justice Act to death penalty resource centers that can provide counsel in individual cases, as well as guidance and support to appointed attorneys in death penalty cases.

Judge Stephanie K. Seymour (10th Cir.), Chair of the Defender Services Committee of the Judicial Conference, and Robert D. Raven, President-elect of the ABA, welcomed conferees to the two-day meeting.

Chief Judges Odell Horton (W.D. Tenn.) and Lawrence K. Karlton (E.D. Cal.) and Judge Eugene P. Spellman (S.D. Fla.) participated in a presentation on coordination between the federal judiciary and the state systems and coordination within federal circuits in providing representation to persons sentenced to death.

The conference also included workshops on securing state and private funding; federal funding policies and procedures; building support for death penalty case resources on the state level; and the role of the federal judge. Participants were provided with materials for death penalty resource planning, such as sample resource center proposals, a "model addendum" for use in amending district CJA plans to designate resource centers as community defender organizations, and the grant terms and conditions that death penalty resource centers would be expected to meet in order to receive sustaining grants.

In 1986, a committee of the Judicial Conference began a study of the impact of the projected influx of death penalty cases reaching the postconviction stage in federal courts. In 1987, the Judicial Conference approved changes in the Guidelines for the Administration of the Criminal Justice Act in light of that committee study and of reports of task forces established by the chief judges of the courts of appeals (see *The Third Branch*, January 1988, at 1). The ABA's Postconviction Project was established in 1986 because of the ABA's concern about the growing need for counsel in death penalty cases. ■

Linda Finkelstein, John Hehman Chosen As Circuit Executives

Linda J. Finkelstein has been appointed Circuit Executive for the Court of Appeals for the District of Columbia, and John P. Hehman has been appointed Circuit Executive for the Third Circuit.

Linda J. Finkelstein

Finkelstein previously served as director of the Multi-Door Dispute Resolution Program of the D.C. Superior Court, a program she developed, and as director of that court's Division of Research, Evaluation, and Special Projects. The

John P. Hehman

See EXECUTIVES, page 7

Appeals Up, Civil Filings Down, AO Data Show

The AO's Statistical Analysis and Reports Division has released the report *Federal Judicial Workload Statistics—March 1988*, summarizing the workload of the courts for the year ended Mar. 31, 1988. During that period, filings in the 12 regional courts of appeals rose more than 6 percent to 36,871. Much of the increase occurred in appeals of federal and state prisoner petitions, which rose by more than 1,000 cases. Dispositions of appeals rose 5 percent during the year, and terminations of appeals on the merits rose 6 percent.

The number of civil filings in U.S. district courts dropped 2 percent from the previous year, to 236,459 cases, continuing a trend of reduction that began approximately two years ago. For the one-year period, there was a drop in U.S. plaintiff filings for recovery of overpayments of veterans' benefits from 22,925 in 1987 to 15,595 in 1988. Cases involving claims of personal injury product liability decreased by 1,910 filings. Claims for disability insurance and for supplemental security income rose, as did prisoner civil rights suits and Employment Retirement Income Security Act cases. Pending civil cases in the district courts increased by 1 percent for the year. Criminal cases filed in the district courts increased 4 percent.

Bankruptcy petitions filed increased 7 percent, and bankruptcy terminations increased 27 percent.

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

Blackmun, Harry A. "John Jay and the Federalist Papers." 8 *Pace L. Rev.* 237 (1988).

Bloomenstein, Adam H. "Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure." 21 *Akron L. Rev.* 289 (1988).

Boren, Don. "Suits Against States in Federal Court: The Current Eleventh Amendment Controversy." 25 *American Business L.J.* 701 (1988)

Brazil, Wayne D. *Effective Approaches to Settlement: A Handbook for Lawyers and Judges.* Prentice Hall, 1988.

Bucklo, Elaine E. "Can a Party Be Required to Attend Trial?" 14 *Litigation* No. 3 at 33 (Spring 1988).

Coffin, Frank M. "Judicial Balancing: The Protean Scales of Justice." 63 *New York University L. Rev.* 16 (1988).

Cooper, Philip J. *Hard Judicial Choices: Federal District Court Judges and State and Local Officials.* Oxford University Press, 1988.

Corr, John B., and Ira P. Robbins. "Interjurisdictional Certification and Choice of Law." 41 *Vanderbilt L. Rev.* 411 (1988).

DiPippa, John M. A. "Suspending Imposition and Execution of Criminal Sentences: A Study of Judicial and Legislative Confusion." 10 *University of Arkansas at Little Rock L.J.* 367 (1987-88).

Guynes, Randall, and Neal Miller. "Improving Court Productivity: Two New Jersey Experiences." *NIJ Reports*, March/April 1988, at 2.

Hartmann, Allen. "'Judges Ma[y] Differ': Another Look at Judicial Decision-Making." 76 *Illinois Bar J.* 540 (1988).

Klein, Andrew R. *Alternative Sentencing: A Practitioner's Guide.* Anderson, 1988.

Litan, Robert E. and Clifford Winston, eds. *Liability: Perspectives and Policy.* Brookings Institution, 1988.

Marsel, Robert S. "The Constitutional Jurisprudence of Justice Potter Stewart: Reflections on a Life of Public Service." 55 *Tennessee L. Rev.* 1 (1987).

Mello, Michael. "Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row." 37 *American University L. Rev.* 513 (1988).

Mengler, Thomas M. "Consent Decree Paradigms: Models Without Meaning." 39 *Boston College L. Rev.* 291 (1988).

Mikva, Abner J. "Jumping at Constitutional Questions Is Risky Business." 14 *Litigation* No. 3 at 5 (Sprin[g] 1988).

See SOURCE, page 5

LEGISLATION, from page 1

"chances of the measure . . . [to] be enacted would be enhanced," and that because the Senate-passed version contained the originally introduced formula, "any compromise in conference would be even more generous" than H.R. 4340.

The following measures pending before Congress are also of interest to the judiciary.

• The Senate passed S. 11, which would authorize judicial review of decisions of the Administrator of the Veterans Administration on claims for benefits and would repeal the prohibition on fees in excess of $10 for attorneys representing veterans in benefit claim cases. A separate bill passed the same day by the Senate, S. 533, would establish a Cabinet-level Department of Veterans Affairs.

• Sen. Howell Heflin (D-Ala.) introduced S. 2601, a bill to amend 28 U.S.C. § 371 to allow a federal judge who is at least 60 years of age and has completed 20 years of service to take senior status. Sens. Dennis DeConcini (D-Ariz.), Edward M. Kennedy (D-Mass.), and Arlen Specter (R-Pa.) are cosponsors of the bill. S. 2601 would permit election of senior status by a judge between the ages of 60 and 65 if the judge's age and years of service equal 80. Sen. Heflin said that his bill would be "more equitable for those judges who enter judicial service at an earlier age." A similar measure, H.R. 3726, has been introduced in the House (see *The Third Branch*, February 1988, at 7).

• The House Judiciary Committee July 26 ordered reported H. Res. 499, impeaching Judge Alcee L. Hastings (S.D. Fla.). The full House is scheduled to consider the resolution on Aug. 3.

• H.R. 4842, an anti-drug bill, was introduced by Rep. Robert Michel (R-Ill.). The bill also contains provisions that would abolish diversity jurisdiction and enlarge the rule of *U.S. v. Leon*, 468 U.S. 897 (1984), to warrantless searches. *Leon* established a "good faith" exception to the Fourth Amendment exclusionary rule where police act in objective good faith and in reliance on a warrant. H.R. 4807, the renumbered "clean bill" based on H.R. 3152, also contains provisions that would essentially abolish diversity jurisdiction (see *The Third Branch*, June 1988, at 2).

• The Subcommittee on Public Buildings and Grounds of the House Public Works Committee held a hearing on S. 1934, the bill that would provide for construction of an office building for federal judicial agencies and retired Supreme Court Justices in Washington, D.C. The subcommittee approved S. 1934, as amended, for full committee action. S. 1934 has already passed in the Senate (see *The Third Branch*, July 1988, at 5).

• A House committee approved H.R. 1115, a bill to establish a federal standard in products liability cases.

The Supreme Court hosted a reception for legislators and other guests at the Court to mark the signing into law by President Reagan on June 27 of S. 952 (Pub. L. 100-352), an act giving the Court greater discretion in selecting the cases it will review by eliminating mandatory review in several areas (see *The Third Branch*, May 1988, at 6). Among those in attendance were (from left) ABA President Robert MacCrate; Justice Antonin Scalia; Justice Lewis F. Powell (ret.); Sen. Howell Heflin (D-Ala.); Chief Justice William H. Rehnquist; Sen. Dennis DeConcini (D-Ariz.); Justice Anthony Kennedy; Rep. Robert Kastenmeier (D-Wis.); Justice John Paul Stephens; and Rep. Carlos Moorhead (R-Cal.). Chief Justice Rehnquist had previously described the bill's passage as "the primary legislative goal of the Court" (see *The Third Branch*, July 1988, at 5).

Rep. Robert Kastenmeier (D-Wis.), Chairman of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Sen. Howell Heflin (D-Ala.), Chairman of the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, principal co-sponsors of the bill that became Pub. L. 100-352, at the reception.

SOURCE, from page 4

Miner, Roger J. "Federal Courts at the Crossroads." 4 *Constitutional Commentary* 251 (1987).

"1987 Survey of Books Relating to the Law." 85 *Michigan L. Rev.* Nos. 5 & 6 (1987).

Norgren, Jill, and Serena Nanda. *American Cultural Pluralism and Law.* Praeger, 1988.

Payor, Susan Margaret. "Post-Judgment Interest in Federal Courts." 37 *Emory L.J.* 495 (1988).

Posner, Richard A. "The Jurisprudence of Skepticism." 86 *Michigan L. Rev.* 827 (1988).

Rehnquist, William H. "The Supreme Court: 'The First Hundred Years Were the Hardest'." 42 *University of Miami L. Rev.* 475 (1988).

Resnik, Judith. *Due Process: A Public Dimension.* Rand Corp., Institute for Civil Justice (1988).

Rieger, Carol T. "The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?" 37 *Emory L.J.* 45 (1988).

Rowland, C.K., Donald Songer, and Robert A. Carp. "Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges." 22 *Law & Society Rev.* 191 (1988).

Stephens, Pamela J. "Controlling the Civil Jury: Towards a Functional Model of Justification." 76 *Kentucky L.J.* 81 (1987-88).

"Symposium—Perspectives on Proposals for a Constitutional Amendment Providing Victim Participation in the Criminal Justice System." 34 *Wayne L. Rev.* 1 (1987).

Tabb, Charles Jordan. "The Bankruptcy Reform Act in the Supreme Court." 49 *University of Pittsburgh L. Rev.* 477 (1988).

Torry, Saundra. "Lawyers Scramble to Fill Void in Death Row Appeals."

See SOURCE, page 7

NOTEWORTHY

Rule 16 does not authorize court to require represented parties to appear at settlement conferences, Seventh Circuit says. Fed. R. Civ. P. 16(f) does not provide the authority for a district court to order represented parties to appear at settlement conferences, the Seventh Circuit held recently. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, No. 86-3118 (7th Cir. June 13, 1988). Both the magistrate and the district court found authority in rule 16 to order defendant Oat to send someone other than its counsel to the conference. Oat sent its attorney to the settlement conference, but he had authority to settle only if Oat would not be required to pay money as a condition of settlement. The magistrate conducting the settlement conference decided that Oat had violated his order that each party be represented at the conference by counsel *and* by a representative having full authority to settle. The magistrate sanctioned Oat under rule 16(f), and after a hearing ordered Oat to pay the expenses incurred by other parties in attending the conference, including attorneys' fees. Oat asked the district court to reconsider the magistrate's order. The district court upheld the sanctions, reasoning that it needed the ability to conduct productive settlement conferences to manage its caseload effectively, and that settlement conferences without the parties present are not productive. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275 (W.D. Wis. 1985).

On appeal, the Seventh Circuit noted that "Rule 16(f) does not state that the court may actually order a represented party to appear. Rule 16(a), however, specifically addresses who the district court may order to appear. Rule 16(a) states that those people are attorneys and unrepresented parties. . . . But nothing in Rule 16(f) specifically authorizes a district court to order a represented party to appear at a settlement conference." The Seventh Circuit said that this result was "consistent with other cases from this circuit indicating that Rule 16's specific language limits a court's authority over pretrial proceedings," including *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), which held that district courts do not have the authority to order litigants or their attorneys to participate in summary jury trials (see *The Third Branch*, March 1988, at 3).

Court may require parties to participate in summary jury trial, M.D. Fla. rules. A district court in the Middle District of Florida has held that it is within the court's powers under the Federal Rules of Civil Procedure and Article III of the Constitution to require parties to participate in a summary jury trial. *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. Apr. 4, 1988). Defendants, in support of their motion to be excused from participation in the summary jury trial, cited the Seventh Circuit's *Strandell* decision (see item above). One defendant also stated that he lived and worked abroad and that it would be very expensive for him to attend the summary jury trial. The court did not find *Strandell* persuasive; it noted that the district has a backlog of cases awaiting trial and has used the summary jury trial device since 1985. The summary jury trial would take two days, while the parties had estimated that the actual trial of the case would require seven weeks. The court pointed to Fed. R. Civ. P. 16 as one basis for summary jury trials, noted that Fed. R. Civ. P. 1 requires courts to secure to litigants just, speedy, and inexpensive determination of their claims, and stressed the court's inherent authority under Article III to perform the task of administering justice. Moreover, the court noted, if the summary jury trial does not lead to settlement, the parties are still entitled to all of their substantive rights, including the right to a binding trial. The court left open the possibility that defendants could be excused from participating in the summary jury trial due to inability to appear for financial reasons, saying that such reasons should be addressed by the magistrate before whom the summary trial was scheduled.

At least one other district court, also disagreeing with *Strandell*, has upheld a requirement that parties participate in a summary jury trial. *Williams v. Hall*, No. 84-149 (E.D. Ky. Apr. 5, 1988) (discussed in *The Third Branch*, June 1988, at 2).

Successor judge must retry case when previous judge had not yet made findings of fact and conclusions of law. Where a district judge recused himself before making findings of fact or issuing any rulings, the successor judge could not make necessary credibility determinations and therefore was required to retry the case, the Eleventh Circuit has held. *Emerson Electric Co. v. General Electric Co.*, 846 F.2d 1324 (11th Cir. 1988). In a contract action, the district judge conducted a bench trial and took the case under submission. Before making any findings of fact or issuing any rulings, the judge recused himself because he owned stock in one of the parties. The case was reassigned to a different judge, who issued a memorandum opinion and entered judgment in favor of Emerson on the basis of the trial transcript. General Electric filed a motion for new trial or, in the alternative, to alter or amend the judgment, asserting that the district court had been required to resolve an issue of credibility without having had the opportunity to observe the demeanor of witnesses. The district court denied the motion, and General Electric appealed.

The Eleventh Circuit discussed Fed. R. Civ. P. 63, which does not explicitly cover instances in which the presiding judge recuses himself before filing findings of fact and conclusions of law. Courts have, however, read into rule 63 the inference that if the presiding judge in a civil case has

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yet to issue findings of fact and conclusions of law, a successor judge must retry the case, the court noted. Two exceptions to this interpretation have developed: where all parties consent to the successor judge's making findings of fact and conclusions of law based on the trial transcript; and where the trial transcript serves essentially as "supporting affidavits" for summary judgment purposes and no credibility determinations are required. Since both parties had not consented to resolution based on the transcript, and credibility determinations were required, the case must be retried, the Eleventh Circuit held.

Judge not present during trial may impose sentence where sufficient familiarity with trial existed. A judge who was not present during the trial and who had been unable to review the trial transcript prior to sentencing could nonetheless impose sentence in a complex criminal case where he was sufficiently familiar with the trial, the Eleventh Circuit has held. *U.S. v. Caraza*, 843 F.2d 432 (11th Cir. 1988). Defendants were convicted of violating federal drug laws. They were sentenced by a judge other than the one who presided over the trial. At the time of the sentencing hearing, the trial transcript was unavailable. On appeal, defendants argued that a judge who was not present during the trial of a complex case may not impose sentence without first having read the trial transcript. The court of appeals noted that the sentencing judge was quite familiar with the trial. He had ruled on numerous pretrial motions while the case was pending before him. He met with the presiding judge to discuss the trial during its progression. The district court's order noted that the sentencing judge would consult with the presiding judge before the imposition of sentence. The Eleventh Circuit distinguished the case relied on by the appellants, in which the record disclosed nothing to indicate that the sentencing judge had familiarized himself with the trial. In the instant case, there was "ample evidence that [the sentencing judge] was familiar enough with the trial to impose sentence," the court held. 843 F.2d at 437.

Magistrate may preside over jury selection, Second Circuit holds. It is permissible for a magistrate to preside over jury selection in a felony trial, the Second Circuit has held, thus reaching a conclusion different from that of the Fifth Circuit. *U.S. v. Garcia*, No. 87-1243 (2d Cir. June 1, 1988); *contra*, *U.S. v. Ford*, 824 F.2d 1430 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 741 (1988) (see *The Third Branch*, October 1987, at 2). A magistrate presided over jury selection, and a trial of defendants was held before a district judge on various narcotics charges. On appeal, defendants argued that 28 U.S.C. § 636 precludes the delegation of jury selection to a magistrate, and that such a delegation contravenes Article III of the Constitution. The court of appeals rejected these arguments. Jury selection delegation is within the scope of 28 U.S.C. § 636(b)(3) and is consistent with the Federal Magistrates Act, and such delegation is permissible even absent a defendant's consent, the Second Circuit held. Moreover, such a delegation does not violate Article III where the district court affords de novo review of unsustained challenges to jurors for cause. ■

EXECUTIVES, from page 3

Multi-Door Dispute Resolution program offers a variety of alternatives to litigation and is a national model project of the ABA. Finkelstein was also involved in other dispute resolution programs at the D.C. Superior Court, including Settlement Week. She has also worked at the White House, the U.S. Department of Education, and the Office of Personnel Management. She is a graduate of Simmons College and did graduate work at Boston College.

Hehman had served as Clerk of the Court of Appeals for the Sixth Circuit since 1974. He is a graduate of the U.S. Air Force Academy and Salmon P. Chase College of Law, and a fellow of the Institute for Court Management. He has served on the Board of Directors of the American Judicature Society and as a member of the Advisory Council of the Institute for Court Management. He chaired the U.S. Appellate Courts Clerks' Standing Committee, chaired the New AIMS users group, and has served as a member of the Steering Council of the Federal Court Clerks Association. ■

SOURCE, from page 5

Washington Post, July 24, 1988, at A11.

Uviller, H. Richard. *Tempered Zeal: A Columbia Law Professor's Year on the Streets With the New York City Police.* Contemporary, 1988.

U.S. Courts—District of Columbia Circuit Report 1987. Chief Judge and Circuit Executive of the D.C. Circuit.

U.S. Courts—Eighth Circuit Annual Report 1987. Chief Judge and Office of the Circuit Executive.

U.S. Government Accounting Office. *Product Liability: Extent of Litigation Explosion in Federal Courts Questioned.* GAO, 1988.

Watson, Andrew S. "Some Psychological Aspects of the Trial Judge's Decision-Making." 39 *Mercer L. Rev.* 937 (1988).

Whitten, Ralph U. "Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4." 40 *Maine L. Rev.* 41 (1988).

Wilkins, William W., Jr. "Plea Negotiations, Acceptance of Responsibility Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines." 23 *Wake Forest L. Rev.* 181 (1988).

"Women and the Constitution: Presentations from the 1987 Eighth Circuit Judicial Conference, Colorado Springs, Colorado, July 17, 1987" (including presentations by Judges Ruth Bader Ginsburg, Constance Baker Motley, and Diana E. Murphy). 6 *Law & Inequality* 1 (1988). ■

Positions Available

Clerk of U.S. Bankruptcy Court, D-Vt., Rutland. Starting salary to $46,679. Appointed pursuant to 28 U.S.C. § 156. Requires bachelor's degree; graduate degree in public or business administration or law desirable. Must possess executive ability demonstrated by progressively responsible administrative experience. Starting date Nov. 1, 1988. Submit cover letter addressing scope of the applicant's managerial achievement, and resume (in triplicate, showing size of current organization's budget, and number and composition of personnel) by Aug. 31, 1988, to Selection Committee, c/o Hon. Francis G. Conrad, U.S. Bankruptcy Court, P.O. Box 6648, Rutland, Vt 05701-6648.

Special Master, U.S. Claims Court, Washington, DC. Salary $54,907 to $72,500 (subject to funding; statute under which work is to be performed becomes effective Oct. 1, 1988). Special master to serve as adjunct to the court under the National Childhood Vaccine Injury Act of 1986. Must be member of bar with at least 5 years' active practice of law; time spent as a judge, judicial law clerk, attorney for federal or state agency, and other qualifying legal experience may count toward the 5 years. Send resume to Gary Golkiewicz, Esq., Chief of Staff, U.S. Claims Court, 717 Madison Place, N.W., Washington, DC 20005.

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Chief Deputy Clerk, U.S. Court of Appeals, Sixth Cir. Salary $27,716 to $54,907. Requirements: 6 years' progressively responsible managerial or administrative experience, law degree from accredited law school; degree in public, business, or judicial administration or in law may be partially substituted for the required experience. Send resume with cover letter by Sept. 1, 1988, to Leonard Green, Clerk, 538 USPO & Courthouse Building, Cincinnati, OH 45202. Open until filled.

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Retired Chief Justice Warren Burger Reflects on Developments in the Judiciary During His Tenure

Warren E. Burger was appointed Chief ustice of the United States by President ixon in 1969. He retired from the position 1986 to serve full time as Chairman of the ommission on the Bicentennial of the U.S. onstitution. In the following interview, he iscusses some of the changes in the federal diciary during his years in service, accomishments in the field of judicial adminiration, and unfinished items on his agenda r the courts.

One hallmark of our tenure as Chief ustice was your sustined attention to he administrative spects of the judial system—State nd Federal. Were he changes you ponsored starting in 969 part of a proram that you had in ind before you beame Chief Justice or id they evolve as ou went along?

I can't say that I had ny preconceived lan because my appointment came as a tal surprise. But I was convinced that he system was not working as well as it ould. I'd been saying that as early as 957 when I spoke at the New York Uniersity Law School about "The Courts n Trial." And I had been a close friend f Warren Olney since we served toether in the Justice Department. When e was Director of the Administrative ffice of the Courts, I worked with him n some of the projects he began to ponsor such as experimenting with eminars for new judges.

My view of the system and its needs so came from observations in private ractice and the cases I argued in varius circuits over the years. Then, while on the D.C. Court of Appeals, I sat as a visiting judge in a number of circuits. That gave me a valuable opportunity to see how our system was working.

But didn't you bring a series of specific proposals to the American Bar Association meeting in Dallas a few weeks after your appointment?

Yes, and we should be grateful for the ABA's work. It immediately acted on those proposals and others later on.

Warren E. Burger

What were those 1969 proposals?

One was to create an organization to train court administrators. In 1969 there was only a handful of people in the country that could be considered professional and qualified court administrators. And they were self-trained; there were no training facilities. I put the question to the Institute of Judicial Administration breakfast meeting —"Court Administrators: Where Would We Find Them?"—and proposed creation of the Institute for Court Management. Bernard Segal, the ABA's incoming President, got the corporation organized within 90 days. Former Attorney General Herbert Brownell became Chairman of the Institute and the Institute sessions began in Denver with a full-time, one-year program funded largely by L.E.A.A. and foundation grants—including the American Bar Association, the American Judicature Society, and the Institute of Judicial Administration. The upshot is that today hundreds of ICM graduates are working in the courts—mostly

See BURGER, page 5

Center to Conduct Time Study of Bankruptcy Judges' Work

Acting on a request from the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, the Federal Judicial Center will conduct a thorough study of the work of bankruptcy judges. The purpose of the study is to improve the formula for determining the required number of bankruptcy judgeships.

Every bankruptcy judge will be asked to keep careful records of work day activities, using special diary forms supplied by the Center for that purpose. Both case-related and non-case-related time will be recorded, so that the full range of judicial activity can be described.

The study will be conducted in five waves of 10 weeks each, with approximately one-fifth of the judges being asked to participate in each wave. Multi-judge courts will be represented in several waves. The first wave of the study is scheduled to begin in the second week of October, with requests for participation going out approximately one month earlier. The starting dates for the second through the fifth waves are Dec. 26, Mar. 6, May 15, and July 31.

By collecting information over an entire year, and by having each region

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LEGISLATION

The following measures before Congress are of interest to the judiciary.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on a number of bills to revise the geographical or organizational configuration of individual judicial districts; on H.R. 3726, a proposal to revise the "rule of eighty" applied to eligibility for senior judge status; and on bills that would establish a Federal Courts Study Commission.

Chief Judge Alexander Harvey II (D. Md.) and Judge Edward R. Becker (3d Cir.) testified on behalf of the Judicial Conference at the hearing, and addressed the relevant statutory provisions of title 28 and Judicial Conference policies. The proposed changes in the configuration of individual judicial districts would affect the Districts of N.J., W.D. Ky., Md., M.D. Fla., S.D. Fla., and E.D. Pa., and ranged in scope from the addition of a statutorily designated location for the holding of court in a given district to the creation of a new division. Judges Harvey and Becker's testimony pointed out that statutorily designating a community in 28 U.S.C. §§ 81-131 is not a necessary prerequisite to a court's sitting in a community, but is a prerequisite to building a courthouse there or leasing commercial space for courtrooms, chambers, and offices. Noting that there are currently "dozens of courthouses that are utilized less than 30 days per year," the judges pointed out the costs of building unnecessary courthouses and leasing unneeded commercial space, which can be avoided by not "statutorily designating" a community unless there is "strong evidence of a great deal of court work to be done there." They summarized the Judicial Conference's policies on changing districts' configurations, and noted that the Conference has a "general record" of approval of consolidation of district court divisions and of reduction of numbers of places of holding court.

H.R. 3726 would permit federal judges between ages 60 and 64 to take senior status if they have been on the bench for 20 years or more. The Judicial Conference has long supported the concept embodied in the bill. A similar bill, S. 2601, is pending in the Senate. Judges Harvey and Becker testified that H.R. 3726 would encourage younger people to accept judgeships and to remain on the bench, and would augment the federal judiciary by creating a small group of federal judges who could take senior status from one to five years earlier than is currently allowed. (A judge's assumption of senior status creates a vacancy in the judgeship for which the President may nominate a successor.) H.R. 3726 would affect only eligibility for senior status under 28 U.S.C. § 371(b), and would not change current law that applies to a retirement from office under 28 U.S.C. § 371(a).

See LEGISLATION, page 12

Center Releases Bankruptcy Mediation Report

Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California, by Steven Hartwell of the University of San Diego School of Law and Gordon Bermant of the Center's Research Division, is now available. The publication reports on California Southern's mediation program for adversary proceedings and contested matters, which was established in 1986.

The authors describe and analyze the program as it developed through the assignment of its first 80 adversary proceedings to mediation. The report is based on interviews with 26 participants in the program and on study of the case files, which the authors describe and from which they draw inferences.

Copies of the report can be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (8 oz.), but do not send an envelope.

AO Task Force Revises Bankruptcy Forms

The Administrative Office has released two new manuals containing procedural forms issued under the authority of Bankruptcy Rule 9009, instructions for using the forms, and other bankruptcy-related materials. Volume I, *Forms and Instructions for the Courts*, is designed for court use. Volume II, *Forms and Instructions for the Public*, an abridged version of Volume I, is designed to assist the general public.

Volume I contains copies of the Official Bankruptcy Forms promulgated by the Judicial Conference, statistical reporting forms that the bankruptcy clerks submit to the AO, internal clerk's office forms, procedural forms issued under Bankruptcy Rule 9009, and other materials. Volume II is intended to be kept at the intake counter so that it may be consulted and photocopied by the public. Instructions are provided for each form, tailored to meet the needs of the expected users. Frequent citations are made to the applicable Bankruptcy Rules and Bankruptcy Code sections. Procedural hints are offered where appropriate. Both volumes contain indices with extensive cross-references.

The revised forms are the product of a special task force of bankruptcy judges and clerks and AO staff, chaired by Peter G. McCabe, Assistant Director for Program Management of the AO. J. Ted Donovan, Assistant Chief of the Bankruptcy Division, edited the forms and prepared the instructions with the assistance of visiting estate administrators.

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

District Court in District of Columbia Using Touch-Screen Computer to Inform Court Visitors

A touch-screen system that allows court visitors to obtain information from the computer system maintained by the court was installed in the District Court for the District of Columbia earlier this summer by Federal Judicial Center personnel. The system is part of a pilot program of testing technologies that also includes the computer-synthesized voice system being used in three bankruptcy courts (see *The Third Branch*, August 1988, at 1), and a project allowing computer users to dial in for access to information.

The touch-screen system consists of a screen attached to a personal computer that contains a copy of the court's database. The screen is divided into zones and displays some graphics. Visitors touch the portion of the screen display offering the desired information, and the next screenful of information appears in response to the touch. A visitor knowing a case number can quickly access the short title of the case, the cause of action, the nature of the suit, the judge's name, the filing date, the case's termination date, and the reopening date. A visitor who knows only the name of a party can enter that name into the system, which will then display an indexed list of all parties, giving the role in the case of that party and the case number. The inquirer will then be able to access case information. The touch-screen system is designed for use by members of the public who may not have much experience in requesting information from the courts. It is located in the public area of the clerk's office.

"Everybody who has used the system likes it," according to Civil New Case Clerk Yvonne Estrada-Perez. "Attorneys who have computers themselves like the fact that the courts are coming around to the type of technology they have."

Persons who would like more information about the touch-screen system may contact Mike Greenwood or Robert Borochoff of the Center's Innovations & Systems Development Division, (202) 633-6400.

Yvonne Estrada-Perez, Civil New Case Clerk (left), and Mary Thomas, secretary to Clerk of Court James F. Davey, inspect the touch-screen system in use in D.D.C.

Ninth Circuit Holds Sentencing Guidelines Unconstitutional

The Ninth Circuit has affirmed two lower court holdings that the Sentencing Guidelines are unconstitutional on separation of powers grounds because the Sentencing Reform Act places the Commission in the judicial branch and requires that three Article III judges serve as members of the seven-person Sentencing Commission that drafted the guidelines. *Gubiensio-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988). The Supreme Court has already granted certiorari before judgment in a district court case raising the constitutionality issue, and will hear arguments in that case Oct. 5 (see *The Third Branch*, July 1988, at 1).

ABA Discusses Resolutions on Federal Court Issues at Annual Meeting Held in Toronto

Several issues relating to the federal courts were discussed at this year's annual meeting of the American Bar Association, held last month in Toronto, Canada. Some resolutions presented in the House of Delegates and actions taken thereon are listed below.

Changes to 28 U.S.C. Three major resolutions to change 28 U.S.C., all from the Committee on Federal Judicial Improvements, were submitted to the House of Delegates. One was a resolution requiring certification by a district court that a judgment or order is a final decision (except for taxation of costs and enforcement proceedings). This resolution was sent back to the Committee for reconsideration.

The second resolution, which was withdrawn, would have modified the definition of corporate citizenship for diversity jurisdiction purposes; included in this second proposal was a proviso that the citizenship of a legal representative of an estate of a decedent, an infant, or an incompetent must be deemed to be in the home state of the decedent, the infant, or the incompetent. These changes are part of a bill pending in Congress, H.R. 4807. (The last ABA action on diversity jurisdiction was taken in 1987, when the House approved a recommendation to increase the amount in controversy requirement to $50,000.)

A third resolution recommended that Congress create a new multiparty, multiclaim jurisdiction in diversity of citizenship cases. This was also referred back to the Committee.

Resolutions from Criminal Justice Section. The Criminal Justice Section submitted several resolutions for ABA endorsement. One related to electronically monitored home confinement. This resolution recommended that three conditions be met when such a sentence is imposed: (1) that the judge find, on the record, that such electronically monitored home confinement is the least restrictive alternative that can be imposed consistent with the protection of the public and the gravity of the offense; (2) that the judge or a probation office not automatically require electronic monitoring as a condition of probation; and (3) that an individual's abil-

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PERSONNEL

CIRCUIT JUDGES

Nominations
Guy G. Hurlbutt, 9th Cir., Aug. 11

Appointment
David M. Ebel, 10th Cir., Apr. 20

DISTRICT JUDGES

Nominations
Robert Leon Jordan, E.D. Tenn, July 25
D. Brooks Smith, W.D. Pa., July 28
Jay C. Waldman, E.D. Pa., Aug. 3

Confirmations
Jan E. Dubois, E.D. Pa., July 26
Karl S. Forester, E.D. Ky., July 26
Fern M. Smith, N.D. Cal., July 26
Herbert J. Hutton, E.D. Pa., Aug. 11
Simeon Timothy Lake III, S.D. Tex., Aug. 11

Appointments
George M. Marovich, N.D. Ill., April 1
Kimba M. Wood, S.D.N.Y., Apr. 20
David A. Ezra, D. Haw., May 20
John C. Lifland, D.N.J., May 20
William G. Cambridge, D. Neb., June 6
Richard A. Schell, E.D. Tex., June 6
Karl S. Forester, E.D. Ky., July 27

Senior Status
William R. Collinson, W.D. Mo., Apr. 1
Hiram H. Ward, M.D.N.C., Aug. 19

Resignation
Gabrielle K. McDonald, S.D. Tex., Aug. 14

Nomination Withdrawn
Robert Roberto, Jr., E.D.N.Y., July 26

BANKRUPTCY JUDGES

Appointments
Walter Shapero, E.D. Mich., July 15
David F. Snow, N.D. Ohio, July 25
Lionel H. Silberman, M.D. Fla., July 27
James R. Grube, N.D. Cal., Aug. 12

Elevations
Irvin N. Hoyt, Chief Bankruptcy Judge, D.S.D., July 1

U.S. MAGISTRATES (FULL-TIME)

Resignation
Richard H. Ralston, W.D. Mo., Aug. 1

AO to Update Work Measurement Formulas

In light of significant changes in the work performed by court staff, the Budget Committee of the Judicial Conference has asked the AO's Office of Planning and Evaluation to give priority to updating the work measurement formulas that are used in allocating positions to the clerks, probation, and pretrial services offices and in making budget projections and allocating resources. Accordingly, beginning in January 1989, that office will initiate a three-year project to reevaluate the current staffing formulas.

Approximately 13,800 positions in the budget projection for the judiciary for fiscal 1989 are based on work measurement formulas. Several of the formulas have not been significantly altered since the early 1980s. In the meantime, factors such as varying local rules and management practices, workload changes, introduction of automation, and new legislation and Judicial Conference mandates have had an impact on the processes and levels of effort required of court personnel. There has been growing concern within the judiciary regarding the present formulas, and Congress has expressed concern about their accuracy and credibility.

The three-year formula reevaluation project will be conducted by AO staff, court personnel, and contractors, using advisory committees, questionnaires, and on-site visits to selected courts. ■

Positions Available

Librarian, Supreme Court of the United States. The librarian is responsible for the management of the Supreme Court Library. Responsibilities include general supervision of 22 employees, management of a collection of approximately 250,000 volumes, budgeting, procurement, space planning, and management of automated information systems. Law degree and advanced degree in library science preferred. A minimum of 6 years of progressively more responsible law library experience is required. Management experience, competence with automated information systems, strong interpersonal skills, and budgeting experience are all required. Salary commensurate with qualifications and experience. Closing date Oct. 14, 1988. Send SF 171 to Personnel Office, Supreme Court of the United States, Room 3, Washington, DC 20543. Tel. 202/479-3404.

Clerk of Bankruptcy Court, S.D.N.Y. Salary $46,679-$72,500. Requires minimum of 10 years' progressively responsible administrative experience, at least three in a position of substantial management responsibility. The active practice of law may be substituted on a year-for-year basis for experience. Education may be substituted as follows: bachelor's degree equals 3 years; postgraduate degree in public, business, or judicial administration equals 1 additional year; law degree may be considered as qualifying for 2 additional years. Law degree, legal practice, and training or experience in judicial administration are highly desirable. Send 3 copies of cover letter and resume by Oct. 7 to Chief Bankruptcy Judge Burton R. Lifland, U.S. Custom House, One Bowling Green, New York, NY 10004-1408.

Chief Deputy Clerk, W.D. Wash. Salary $39,501-$54,907. Responsible to the Clerk for the supervision and management of 40 court employees. Must possess bachelor's degree and minimum of six years' administrative or supervisory experience in business or a public organization, three years of which must have been progressively responsible, culminating in a responsible management position, preferably in a federal, state, county, or local court. Favorable consideration given to automation experience and to advanced degree in management, law, public administration, or criminal justice. Send comprehensive resume and cover letter, thoroughly specifying work experience, education, skills, abilities, accomplishments, and salary progression to Mrs. F.D. Fields, Chief Deputy Clerk, U.S. District Court, 308 U.S. Courthouse, Seattle, WA 98104. Applications must be received by Sept. 23, 1988.

Supervisory Deputy Clerk, Court of Ap-

EQUAL OPPORTUNITY EMPLOYERS

BURGER, from page 1

n the state courts, since there are only about 18 Federal Circuit and District Court positions. We need at least 40.

Did you think the Federal Courts also needed court administrators?

Definitely. We really need about 40. Congress authorized 11 Circuit Executives in 1971. Initially we tried to get Congress to provide similar positions for all metropolitan district courts, but that was not done. Later Congress gave us six such positions, on a temporary basis. Every district having more than eight or ten judges needs an administrator to keep things moving. The problems in the large districts like New York, Los Angeles, Atlanta, or Chicago are very different from those in the smaller districts of Minnesota or Kansas. Court administrators deal essentially with "traffic management" problems.

What were the State–Federal Councils that began in 1969?

At the 1969 ABA Annual Meeting I spoke to the Conference of Chief Justices and asked each State Chief Judge to meet with the ranking Federal judge in each state to create a small, informal group to iron out tensions between the two systems—for example coordinating trial calendars and jury calls. These councils were especially important for the large states. There are about 35 such councils now, and new methods of cooperation have also developed.

Weren't prisons on your 1969 agenda at the ABA?

Yes, and the Association created a commission of lawyers and members of other professions—Dr. Karl Menninger of the famous Menninger Clinics, for example. Chief Justice Hughes of New Jersey was the first Chairman, and they came up with some valuable proposals. Part of the value was developing a national interest.

You've had a long-standing interest in prisons, haven't you?

I've said for 30 years that it makes no sense to put people in prison and not train them to do something constructive—and make them better human beings while there and when they get out. We need "factories with fences," not human warehouses. We need to train them in some marketable skills. Also that every prison should have a grievance procedure along the lines that labor unions have to resolve prisoner complaints. When this was done there was a sharp drop in Federal cases on minor grievances.

What are some of the other changes you urged?

I think it would be more beneficial to talk about the failures I encountered—what still needs to be done.

We can get to those, but what about the accomplishments?

The National Center for State Courts, like the Institute for Court Management, was long overdue. Now that the State Justice Institute is in place, it will also provide assistance to the state courts.

Why were you concerned with the state courts?

That is where more than 90 percent of all litigation arises. The State and Federal Courts are simply different pews in the same church. I first came to see the need in 1957 when I was involved in helping develop an idea conceived by then Justice Fred Hamley of the Supreme Court of Washington (later on the Ninth Circuit Court of Appeals) and Russell Niles, Dean of the New York University Law School. I worked on the faculty of the New York University Seminar for Appellate Judges from 1957 to 1969 and learned from the State Supreme Court Justices some of their problems.

How did the National Center for State Courts come about?

In 1971 we convened a Conference on the Judiciary at Williamsburg and there proposed that the Center be created along the lines of the Federal Judicial Center. The National Center for State Courts now has a $4-5 million headquarters at Williamsburg and has made enormous contributions to improving the work of the State Courts. That conference was developed by a team that included Justice Tom Clark, Justice Paul Reardon of the Supreme Judicial Court of Massachusetts and Justice Louis Burke of the Supreme Court of California.

What else?

I think we made some progress, at least in some districts, in countering this idea that any new lawyer can walk out of a law school with a degree, pass the state bar exam, and then walk into any federal court in the country and be admitted, very often engaging in on-the-job training at the expense of their clients and the system as a whole. The Judicial Conference created a special committee chaired by Judge Edward Devitt made up of trial judges, lawyers with trial experience, and law teachers which studied that whole problem. Because of their work, at least in some of the courts, new lawyers must show they have a basic knowledge of the Federal procedural rules and the rules of evidence. Every Federal court should require some kind of minimal examination for admission.

What were other projects?

"I've said for 30 years that it makes no sense to put people in prison and not train them to do something constructive."

"I would say . . . that—more so now than 20 years ago—judges and lawyers tend to view the judicial process as a system, and to realize that we all have an obligation to the consumers of our legal system and the taxpayers who support it."

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NOTEWORTHY

ABA Committee role in judicial selection not subject to Federal Advisory Committee Act, D.D.C. holds. The District Court for the District of Columbia has held that although the ABA Standing Committee on the Federal Judiciary is an advisory committee "utilized" by the Department of Justice within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II, that act cannot be applied to the ABA Committee without violating the separation of presidential and Congressional powers specified in Article II of the Constitution. *Washington Legal Found. v. Department of Justice* (D.D.C. Aug. 4, 1988). The plaintiff, Washington Legal Foundation, and plaintiff-intervenor Public Citizen sought a declaratory judgment that the Department of Justice's use of the 14-member ABA committee for evaluations of the qualifications of judicial nominees violates FACA. The plaintiffs requested that if the Department of Justice continued to solicit advice from the ABA Committee, that the Department be enjoined to comply with FACA requirements such as filing an advisory committee charter, providing advance public notice of committee meetings, opening meetings to the public, assigning a federal official to attend all meetings, maintaining and providing public access to the committee's records, and having a "fairly balanced" membership in terms of points of view.

The Department of Justice has relied on the ABA Committee's investigation and evaluation of the professional qualifications of potential nominees for federal judgeships since 1952, the court noted. It held that the ABA committee's "historically lengthy, direct, and significant relationship with DOJ in the evaluation process" supports the conclusion that the committee falls within Congress's definition of "advisory committee" as that term is used in FACA. The court analyzed the roles in the nomination, confirmation, and appointment processes as provided for in Article II of the Constitution and held that "Congress cannot impose FACA in this case because of the specific limitations on the role of the legislature as expressed in Article II." The application of FACA to the ABA Committee "would potentially inhibit the President's freedom to investigate, to be informed, to evaluate and to consult during the nomination process," the court said. Moreover, the purpose furthered by FACA—public accountability—is satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA committee and to request additional information, and in which other groups and individuals have an opportunity to present views different from those of the ABA committee. Thus, "no overriding congressional interest has been demonstrated that outweighs FACA's intrusion on the nomination power of the President." The court entered judgment against the plaintiffs and in favor of the Department of Justice and dismissed the action.

Seventh Circuit, voting en banc, vacates panel decision in *Heileman Brewing* case on requiring parties to attend settlement conferences. The decision of the panel in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, No. 86-3118 (7th Cir. June 13, 1988), has been vacated by the court voting en banc and rehearing ordered for Sept. 27. The panel decision, summarized in NOTEWORTHY last month (see *The Third Branch*, August 1988, at 6), had held that Fed. R. Civ. P. 16 does not authorize the court to require represented parties to appear at settlement conferences.

Fourth Circuit, sitting en banc, affirms district court decision on Virginia's obligation to provide counsel to state habeas petitioners in death penalty cases. The Fourth Circuit, sitting en banc, has affirmed a district court decision that held that the Commonwealth of Virginia, in order to satisfy its obligation to provide death row inmates with meaningful access to the courts, must provide appointment of counsel upon request to such inmates filing state habeas corpus petitions. *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988). A Fourth Circuit panel had earlier reversed the district court decision as to this issue and held that Virginia met its obligation to provide meaningful access with its system of law libraries, institutional attorneys who act in an advisory capacity in preparing postconviction petitions, and appointed counsel in cases requiring an evidentiary hearing. *Giarratano v. Murray*, 836 F.2d 1421 (4th Cir. 1988) (discussed in *The Third Branch*, March 1988, at 4). The district court opinion, the Fourth Circuit panel opinion, and the en banc opinion all held that the right of meaningful access to court does not require the appointment of counsel for federal habeas corpus and certiorari petitions. ■

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I don't believe it helps much to dwell on all this. I would say, though, that—more so now than 20 years ago—judges and lawyers tend to view the judicial process as a system, and to realize that we all have an obligation to the consumers of our legal system and the taxpayers who support it. And this change in attitude, if it occurred, occurred during a time of tremendous growth in the Federal judiciary—growth made necessary by a steady increase in filings and new Federal jurisdictions.

When I took office, there were about 300 district judges and we had about 100,000 civil and criminal cases. Now there are well over 500 judges and over 275,000 cases. There were about 90 circuit judges and 10,000 appellate cases. Now we have around 160 circuit judges and over 35,000 cases. The increase in filings vastly exceeds the increase in judgepower. Given this tremendous growth, I think the system has held together very well. That is why we had to create the Magistrate Courts, which are working very well.

What about the Supreme Court's caseload?

Now we're getting to my "failure agenda."

Failure to keep the caseload down?

No—failure to get a mechanism in place to deal with the expanding caseload. In my last years on the Court of Appeals, the Supreme Court issued around 70 to 90 signed opinions annually. By the early 1970's it grew to about 120. It is now around 150. The same is true for cases filed: 1,200 or 1,300 in the early 1950's to over 3,000 by the late 1960's and now it is around 5,000 each year. In other words, a steady increase in the work but no increase in the number of Justices, and I don't think an increase in the number of Justices would help.

How long has this subject been discussed?

More than 40 years ago Professors Felix Frankfurter, Henry Hart and others raised this issue, stating that 100 signed opinions a year was the maxi-

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m the Supreme Court could handle
t was to maintain proper quality.

So what was the answer you saw in 69?

I didn't have the answer, but I knew it eded study. We created the so-called eund Committee in 1971 under the spices of the Federal Judicial Center, hich was just getting under way then. at committee, with Paul Freund, exander Bickel, and others, repre-nted a wealth of Supreme Court expe-nce. They recommended creation of intermediate court between the urt of Appeals and the Supreme urt.[1]

That recommendation ran into a lot opposition. Were you surprised?

t was what I expected. It takes time any development of this kind; the gal mind tends to cling to old ideas ecause we've always done it that y." For that matter, I certainly wasn't nvinced that this intermediate court s the answer. But something had to done to start towards an answer, and s committee report was only a begin-ng.

n fact, the next step was a proposal in e of my early State of Justice Reports the ABA that Congress create a com-ssion to study what to do about the pellate problem. This commission[2]—nator Roman Hruska chaired it and ofessor Leo Levin served as Executive rector—heard testimony around the untry and put in several years of dy and came to about the same con-sion as the Freund Committee.

t wasn't exactly the same, was it?

No it wasn't. But it did agree with the eund Committee on the case over-d. The Hruska proposal put a lot re emphasis on the problem of con-cts among the circuits. It is wholly ppropriate for a particular question be decided one way in one circuit and other way in a different circuit, or at st to let that difference stand for very ng. Some conflict is tolerable for a ile, but not very long if we are to have easonably uniform quality of justice this country. One objection was the surd proposition that the increase in caseload is the Court's fault for accepting too many cases, instead of leaving them to the Courts of Appeals. If a Court of Appeals openly disregards holdings of the Supreme Court, or if a conflict arises, the only proper action is review and reversal. Countless new statutes over the past 20 to 30 years created new Federal jurisdiction.

Another independent committee, studying both state and federal appellate procedure, supported the findings of the Freund and Hruska Reports. That committee was chaired by Professor Maurice Rosenberg of Columbia University, a former Assistant Attorney General.

Didn't you present an alternative proposal to a permanent intermediate court?

Yes. About three or four years ago, I suggested that in place of creating a permanent court, we try a temporary experiment for three to five years. The Supreme Court would create a panel by selecting one judge from each circuit and from that group draw a panel of nine who would come to Washington—or Chicago—perhaps twice a year to hear cases. The Supreme Court would refer statutory interpretation cases—not constitutional questions—to the panel. If it didn't work out, we could say we tried the experiment and drop it.

Haven't some objected to an intermediate court because it would place too much of a burden on the Courts of Appeals?

That point has been raised, but it is without any substance. Under this experiment a panel of nine circuit judges would sit perhaps twice a year for a week each time. Since these conflicts arise at the circuit level, the circuit court judges should be given the chance to rectify the problems as they do with en banc hearings—and my preference would be to draw primarily on Senior Circuit Judges. This panel would address only issues of statutory construction—not constitutional cases. A minority of Federal judges opposed this idea from the start and Congress never really got to the heart of the problem.

Incidentally, one of the principal problems of statutory interpretation in the last 25 or 30 years has been the cloudy language of many statutes. Careful statutory draftsmanship is almost a lost art, with staffers and lobbyists getting so involved in the drafting process.

How much relief would this intermediate court give the Supreme Court?

Possibly up to one third of its load.

Has the experimental proposal gone anywhere?

Not very far. Apathy and inertia seem to surround proposals for improving the administration of justice unless there's a driving force behind them. The legal profession is just not very interested in the Court's caseload.

Is the Supreme Court functioning as efficiently as it should?

I have difficulty thinking how the Court could work more efficiently than it has for the 35 years that I've watched it closely. In 1970 the Court reduced the oral argument time from one hour to 30 minutes so we heard 12 cases each week instead of eight; it has reduced the time devoted to reading lengthy announcements of opinions from several hours on a given day to 10 or 15 minutes; and the

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CALENDAR

September 7-11 Workshop for Bankruptcy Clerks
September 8-11 Second Circuit Judicial Conference
September 12-16 Orientation Seminar for New Probation/Pretrial Officers
September 14-15 Judicial Conference of the U.S.
September 14-16 Workshop for Operations Managers
September 18-20 Third Circuit Judicial Conference
September 23-24 Advisory Committee on Bankruptcy Rules
September 25-26 Claims Court Judicial Conference
September 26-30 Orientation Seminar for New Probation/Pretrial Officers
September 26-28 First Circuit Judicial Conference

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Court has eliminated the requirement that every person admitted to the Bar be present in the Courtroom. Those steps saved a large amount of judge time.

Would it be an improvement to have a true Supreme Court Bar—that is, a group of specialists who would argue most of the cases before the Court?

I am not sure. There is no "Supreme Court Bar" as the term is understood in the profession, as there probably was a century ago or even 50 years ago. One exception is the professional career staff of the Solicitor General's office—they are consistently very good. The advocacy in most court cases is very good, and I believe it improved during my 17-year tenure. We sponsored a helpful program to assist state advocates with brief work and a practice or "moot" run of a case supervised by the Conference of State Governments.

At some point you advanced the idea of a Tenth Justice for Administration. Where does that stand?

That was another long-range proposal to stir up some debate. Professor Dan Meador at the University of Virginia later had a seminar on this and the result was a recommendation for a "Chancellor" to do what I had in mind for the Tenth Justice for Administration. That gave substantial support for the basic idea but the title of "Chancellor" could cloud the function. It is an obsolete title fitting for the Smithsonian or an ancient university, but not in the courts of our day.

How would the Tenth Justice be selected?

I would have the selection made by the Chief Justice. He would choose from among the Article III Federal Judges then in office to serve an indefinite term and then to return to his or her status as a Circuit or District judge. This would really be an assignment process. The Chief Justice could do it now with respect to a Federal Judge eligible for senior judge status but he couldn't really give that judge the title of "Tenth Justice for Administration." In fact in August 1969 I asked the late Third Circuit Judge William Hastie, then a senior judge, to move to Washington to do something along those lines but he preferred to stay with judicial work. In addition to Judge Hastie, 30 years ago Judge Albert Maris would have worked, and more recently Judge Edward Tamm. Tom Clark in retirement would have fit. Of course there are others.

"There is too much 'judge shopping' in this country in both the Federal and State courts. This is particularly true in criminal cases . . . ."

What would be the duties of this Tenth Justice and why would that title help?

The title and status would be very important in carrying out the function. He or she would carry a good deal of the work of dealing with the Judicial Conference of the United States. Perhaps even presiding as a sort of "vice chairman." This would also be true with respect to the Federal Judicial Center, whose Board of Directors is chaired by the Chief Justice. The Tenth Justice would closely follow the work of the Judicial Conference Committees, act as Congressional liaison, and oversee the programs of the Federal Judicial Center. It would be an almost full-time job to attend even the meetings of the major Judicial Conference Committees.

Aren't these duties performed by the Administrative Assistant to the Chief Justice?

In part, yes, but not to the extent the Tenth Justice would do it. The prestige of being an Article III judge and the title of Justice would make the situation quite different. Moreover, an experienced Article III judge selected for this position would bring an added dimension of background and knowledge of how the courts work. The function would be a matter of evolution.

What if a Chief Justice were to fi that this concept was not working?

Then he could drop the idea. This is another good example of the need to try out new ideas.

Do other countries have such a po sition?

Yes, in a sense. In England, our near est systemic ancestor, these people do what the Chief Justice of the United States is called upon to do by Congress The Lord Chancellor does some of wha our Chief Justice does; the Lord Chie Justice does some presiding over th Court of Appeals for criminal cases. Th Master of the Rolls presides over th Court of Appeals, reviewing civil an administrative law cases. In Franc there are three Courts and three Chief doing what the United States Chief Jus tice is assigned to do. It is simply unreal istic to ask our Chief Justice to functio under a system set down in 1789 in th Judiciary Act, when there were only 1 Federal judges and six Supreme Cou Justices. And many state courts have judge assigned full-time to adminis tion. New York is but one example.

What are some of the other thing you wish you could have seen to com pletion?

I didn't have much success con vincing the district courts to establis case assignment systems that took ac count of the complexity and difficulty o the case as well as the background an experience of the judge. That woul apply to only a small percentage of th cases, but it is crucial to any rationa judicial system. If a multiple defendan criminal case comes along, or a comple antitrust case, the Chief Judge or th assigning committee of the court shoul not let that go by a random draw to brand new judge who may have limite litigation experience and perhaps non in antitrust.

Has that been tried in America courts?

Very little and not enough. A problem has been that even when the system ha proven its value, when a new Ch Judge comes along he or she may n follow through. In one instance a new

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udicial Conference Standing Committee eleases Proposed Rules Changes

The Standing Committee on Rules of ractice and Procedure of the Judicial onference of the United States, chaired Judge Joseph F. Weis, Jr. (3d Cir.), has leased proposed federal rules amendents, one proposed new rule, and one oposed new form. The changes origited in the Judicial Conference Advisry Committees on the Federal Rules of ppellate Procedure, the Federal Rules Civil Procedure, the Federal Rules of iminal Procedure, and the Federal ules of Bankruptcy Procedure. The anges are being circulated to the nch and bar and to the public generly for comment. The Standing Comittee on Rules of Practice and Proceure has not approved these proposals, r have they been submitted to the dicial Conference or the Supreme ourt. Comments and suggestions on e proposals are requested as soon as ssible, and not later than Dec. 31, 88. No hearings are planned at this he by the Advisory Committees.

Proposed changes include these:

• *Appellate Rules*. Repeal of current le 6 and replacement with a rule recnizing that parties have a right to peal; a change in rule 26(a)'s method counting time when intervening eekends and legal holidays are inlved; and new rule 26.1, requiring a rty to disclose corporate affiliates so udge can ascertain whether he or she s any interests in any of the party's ated entities that would disqualify e judge from hearing the appeal.

• *Criminal Rules*. Rule 11 would be nended in light of guideline sentenc, particularly with respect to notice guidelines to defendants. Rule 32 ould be amended to adjust the rule to e requirements of guideline sentenc, especially with respect to defense cess to presentence reports, and rule (c)(E) would be abrogated. The recmmended abrogation of subdivision reflects the following facts under ideline sentencing: that there will be ses in which the defendant has a need the presentence report during the eparation of or response to an appeal; that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines; and that the Supreme Court's decision in *U.S. v. Julian*, 108 S. Ct. 1606 (1988), suggests that defendants will routinely be able to secure their presentence reports through FOIA suits. The proposed amendment is intended to prevent unnecessary FOIA litigation. Rule 41 would be amended to facilitate return of seized property while protecting legitimate law enforcement interests in such property, and to eliminate confusing language from the rule. Rule 45 presently provides that intervening weekends and legal holidays shall not be counted in computing time when the time period prescribed or allowed is less than 11 days. The proposed change in rule 45 would exclude weekends and legal holidays when the time prescribed for action is less than eight days.

• *Civil Rules and Bankruptcy Rules*. The time calculation under Fed. R. Civ. P. 6 and Fed. R. Bankr. P. 9006(a) concerning the exclusion of intervening weekends and legal holidays would be amended from 11 to 8 days to conform with the proposed changes to Fed. R. App. P. 26(a) and Fed. R. Crim. P. 45(a).

• *Evidence Rules*. Rule 609(a) would be amended to remove from the rule the limitation that evidence of a witness's conviction of a crime may only be elicited during cross-examination, and would resolve an ambiguity as to the relationship of rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant.

Address communications concerning the proposals to: Committee on Rules of Practice and Procedure, Administrative Office of the U. S. Courts, Washington, DC 20544. ■

FJC Releases Publication on Patent Law

Patent Law and Practice, by Professor Herbert Schwartz of the University of Pennsylvania School of Law, the most recent publication in the Center's Education and Training Series, is now available. A précis of American patent law, the book traces the steps followed in obtaining a patent, explains the conditions required for a patent, and discusses the defenses against and remedies for patent infringement. It is designed to provide an overview of this specialized field in the law. The author has included an annotated bibliography of sources on the topic.

Copies of the publication are available from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (6 oz.), but do not send an envelope.

Supreme Court Studies Automated Opinion Access

The Supreme Court has taken the first step toward making its opinions available via computer by inviting legal publishers, legal research database providers, and news wires to submit preliminary proposals for how they would handle electronic dissemination of the Court's decisions. The invitation is based on a study of possible problems and alternative approaches conducted over the last 18 months by a group of Court staff members headed by James R. Donovan, the Court's Director of Data Systems.

The Court's action was in response to numerous inquiries from legal organizations, news agencies, and others seeking electronic access to decisions immediately after release by the Court.

The invitation was sent to organizations that have shown an interest in distributing Supreme Court opinions, but the opportunity to participate is open to any organization with the qualifications to fulfill the Court's considerations and objectives. To explain the project and to answer questions from interested parties, the Court will conduct a meeting on Sept. 29, 1988. Attendance will be restricted due to limited seating. For information, contact James R. Donovan, Director of Data Systems, Supreme Court of the United States, Washington, D.C. 20543. ■

BURGER, from page 8

Chief Judge declined to continue the assignment method of his predecessor, maintaining that "every judge is entitled to an equal chance to a front page case." My response was that this was a totally new principle of judicial administration.

This assignment method is a common practice in some systems. The nearest parallel we have are the British courts. The Chief Judge or presiding judge takes the background and experience of a judge into account in assigning special cases. And, of course, they have specialized courts.

How are cases categorized?

Cases are assigned specific categories, such as admiralty, family and divorce, equity court, and criminal. English judges are generalists as a good judge should be but they are also specially skilled in certain areas.

You see a lot in the British system worth emulating, don't you?

I've been accused of being an Anglophile, even though I've said repeatedly that we shouldn't try to duplicate the British system here. We couldn't even if we wanted to. But I can't see any great harm in studying what they do well. In some of the Anglo-American exchanges that have been going on for 25 years, the members of the American team were astonished to see cases tried in one or two days that regularly take one or two weeks—or more—to try in the United States. In civil cases in England—except in a few categories such as slander and libel—juries were abolished a half century ago. A British civil case may be finished before we would pick a jury. In some American courts, the judges tend to let the lawyers run the show. Some lawyers like that, but it's dead wrong. Jury selection that takes weeks—sometimes it takes even more—is a perversion of justice. The Bar and Bench over there are appalled to see the time wasted on jury selection here.

What other judicial "failures" have you addressed?

There is too much "judge shopping" in this country in both the Federal and State courts. This is particularly true in criminal cases and perhaps is most objectionable in connection with guilty pleas. Assignment of judges to take guilty pleas should be done so that there is a genuine random assignment to prevent a lawyer from either rushing or delaying his case in order to get a more "lenient" judge.

You certainly weren't silent about the compensation of judges.

Silence would have been the height of irresponsibility. My regret is that we weren't able to break this linkage between Congressional salaries and judges' compensation. That linkage is completely without rational foundation. Federal judges understand that they're not going to have the same earning power as in private practice, but that's no excuse for letting their earning power—in real dollars—decline each year. According to an analysis of the top thousand corporations in *Fortune* magazine, the average salary of chief corporate executives is $590,000. The presidents of the World Bank and the International Bank, as well as the Secretary of the Smithsonian Institution, are compensated substantially more than Supreme Court Justices, who receive slightly over $100,000 a year. The day has come when men and women who are truly capable of serving as Federal judges just won't do it, and once we have lost that, I'm afraid we'll never get it back. More Federal judges have resigned on economic grounds in the past 20 years than in the previous 180 years. The Federal judges as a whole make a great sacrifice to serve.

Throughout these developments beginning in 1969 there seems to be a pattern of working with the ABA, the state courts, and others, even in situations where you have initiated the program. Do you care to comment on that?

A one-man show does not get results. Most good things are the result of teamwork, and a combination of both ideas and execution. If I learned anything under President Eisenhower, it is that a person can accomplish a great deal more if other people get the credit. The Conference on the Judiciary at Williamsburg, for example, was something I had discussed with Tom Clark and a great many others. Clark was a major part of this planning. Most of these programs were matters that had been discussed with various members of the Judiciary in order to develop a consensus. When it was necessary, I had no hesitation in communicating with whoever occupied the Office of Attorney General, or the Chairman of the House or Senate Judiciary Committee, or the Chairman of the Subcommittee on Appropriations.

Anything else?

One more thing comes to mind—the matter of a Federal Judiciary Building so that the Administrative Office and the Judicial Center wouldn't be scattered all over town, as they are now. The Supreme Court needs some extra space as well. This has been one of my objectives for 15 years, and if a Judiciary Building had been built in 1970 or 1972, the rent used for the Center and the AO could have paid for it—and more. But that's in the past. Things seem on track now for the building in Washington by Union Station. Construction will begin on that building within a year.

Are you really out of active service?

In the judicial sense I am, but the Bicentennial of the Constitution is everything I expected it to be in the way of work and more. There is a great deal of satisfaction from helping to tell the great story of our Constitution to the country and to the world. And there's much more to be done. We are now focusing on primary schools, high schools, colleges and universities.

1/ The Study Group on the Caseload of the Supreme Court: Professor Paul A. Freund (Chairman), Professor Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Professor Charles Alan Wright.

2/ Commission on Revision of the Federal Court Appellate System: Senator Roman L. Hruska, Judge J. Edward Lumbard, Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator John L. McClellan, Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins, Judge Roger Robb, Bernard G. Segal and Professor Herbert Wechsler. ■

BA, from page 3

to pay for the use of an electronic onitoring device not be considered in etermining whether to require the use such a device. The resolution was ap-oved.

A second resolution asked for ap-oval of "Guidelines Governing Resti-tion to Victims of Criminal Conduct." ese Guidelines were written to pro-de assistance to practitioners in the minal law area, but should be of inter-t to all judges, prosecutors, and de-nse lawyers when they are consider-g either court orders or recommenda-ns for court orders aimed at assuring at a victim is fairly compensated. This solution was approved.

A third resolution, also approved, ked that the ABA approve additions Chapter 7 of the Criminal Justice ental Health Standards, entitled *Com-ence and Confessions*. The additions ate to the admissibility and volun-iness of statements by mentally ill or arded persons. This final product is result of over three years' study, er the involvement of a special inter-ciplinary task force appointed in 85, consultation with at least 24 or-nizations, and final recommenda-ns to the Criminal Justice Section by a ecial seven-member task force.

The drafters point out that many tes have still not resolved the com-x procedural issues arising since the S. Supreme Court's decision in *Colo-o v. Connelly* in 1986. These additions, refore, are offered as an assistance rticularly to the states.

Jurisdiction in child custody dis-tes. The House of Delegates ap-oved a resolution asking Congress to ss legislation clarifying that the fed-l district courts do have power to olve the issue of conflicting state ims to jurisdiction over child custody putes. In 1980 the Parental Kidnap-g Prevention Act was passed to oid jurisdictional competition and nflict between state courts. Since then r circuits have held that the federal rts have jurisdiction in such cases. e circuit, however, has held that the did not create a cause of action in a eral court. Last January the Supreme Court held that the Kidnapping Act does not provide an implied cause of action in federal court. However, the opinion contained language to the effect that "Congress may choose to revisit the issue."

Sabbatical leave. Although sabbatical leave for judges is a concept adopted by other countries, it is in use in the U.S. in only one state, Oregon. The House of Delegates has now endorsed a resolution that recommends adoption of legislation to provide sabbaticals for judges, either for six months at full salary or for one year at half salary.

All reports and resolutions submitted for the 1988 annual meeting are available at the Center. For this or other information write Alice O'Donnell at the Center or call (FTS) 633-6359. ■

Justice Powell Speaks on Death Penalty at ABA Annual Meeting

Retired Justice Lewis F. Powell addressed the Criminal Justice Section of the ABA last month at the annual meeting in Toronto. Speaking on the habeas corpus process in capital cases, he called upon Congress and state legislators to review existing procedures with a view to making improvements. Years of delay and repetitive appeals all the way to the Supreme Court, often on the eve of the execution date, the Justice said, are almost routine, place heavy burdens on the courts, and often prevent "mature and thoughtful consideration." He quoted Chief Justice Rehnquist, who has said that the system is "disjointed and chaotic."

Justice Powell summarized his comments by saying "[T]here are no easy answers to the problems of our murder rate . . . but I do not think we should accept these problems as inevitable . . . . I adhere to the view that the death penalty lawfully may be imposed . . . . My concerns relate to the way the system malfunctions, and to the shocking murder rate that prevails in our country . . . [which] appears to be the highest among the democracies."

Chief Justice Rehnquist has appointed Justice Powell Chairman of a newly formed Judicial Conference Special Committee on Habeas Corpus Review of Capital Sentences. The other committee members are Chief Judges Charles Clark (5th Cir.), Paul H. Roney (11th Cir.), and Wm. Terrell Hodges (M.D. Fla.), and Acting Chief Judge Barefoot Sanders (N.D. Tex.).

TIME STUDY, from page 1

of the country represented in each of the five waves, the study should largely avoid the misleading results that might arise from seasonal and regional differences in bankruptcy filing rates or other aspects of bankruptcy court activity.

This time study follows the procedure the Center has used in earlier studies of caseload in appellate, district, and bankruptcy courts. The key feature of the methodology is the relating of time spent on specified cases to the types and ages of the cases. When all the information has been collected, the analysis will show how much time is spent on each case type during each period in the life of the case.

By summing up the amounts of time spent at each time period for each case type, a case weight for each case type can be specified. Case weights can be calculated for any case type that can be routinely identified on the basis of information supplied by the courts to the Administrative Office. An earlier time study of the bankruptcy courts provided case weights for more than a dozen case types, ranging from Chapter 7 cases with no assets to large Chapter 11 cases. Weights for adversary proceedings can be calculated and reported separately or included as part of the weights of the case types out of which the proceedings arise.

When case weights have been established for each case type, weighted caseloads can be calculated for each court based on the volume and case-type mix of the court's filings. These weighted caseloads can guide the courts and the Judicial Conference in their consideration of requests for new bankruptcy judgeships. ■

LEGISLATION, from page 2
S. 2601 would extend the sliding scale in current law so that eligibility for senior status would begin at age 60 with 20 years of service as in H.R. 3726, but S. 2601 would reduce the years of service one year for each year beyond 60, so that a judge could take senior status with 19 years of service at age 61, 18 years of service at age 62, and so forth. Under H.R. 3726 the years of service requirement to take senior status would remain 20 years from age 60 to 65, when it would drop to 15.

The Subcommittee also heard testimony on H.R. 1929 and H.R. 3227, bills that would establish a Federal Courts Study Commission. H.R. 1929 contains a sunset provision that would limit the Commission's life to 10 years; H.R. 3227 contains a two-year sunset provision. The Judicial Conference has urged favorable consideration of a bill to create a temporary commission to study the judiciary. Judge J. Clifford Wallace (9th Cir.) provided a written statement to the Subcommittee detailing the history of the idea for such a study commission, and endorsing the concept contained in H.R. 1929 of a commission that would have two years to study problems and develop long-range goals and eight years to make annual recommendations to Congress and the President.

The Subcommittee also considered H.R. 4309, which would make surviving spouses of judicial officials who died before Oct. 1, 1986, eligible for increased annuities that became effective as of that date (see *The Third Branch*, May 1988, at 3).

• The House of Representatives voted to impeach Judge Alcee L. Hastings (S.D. Fla.). The House Judiciary Committee had approved an impeachment resolution following hearings. The House also appointed six of its members as managers to appear before the Senate to try the impeachment.

• The House Judiciary Committee ordered reported the Court Reform and Access to Justice Act of 1988, H.R. 48[illegible] with amendments. The bill, originally introduced as H.R. 3152, contains a number of provisions supported by the Judicial Conference (see *The Third Branch*, June 1988, at 2).

• The Senate Judiciary Committee ordered reported, with amendments, S. 1867, to amend the Court Interpreters Act of 1978, 28 U.S.C. § 1827 (see *The Third Branch*, Jan. 1988, at 1).

• The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice approved for full Committee consideration, with an amendment, S. 1961, the Federal Debt Collection Act (see *The Third Branch*, February 1988, at 4).

• Rep. Robert Kastenmeier (D-Wis.) introduced H.R. 5161, a bill to provide Claims Court judges pay equality with judges of the U.S. Tax Court, and to provide retirement and survivors' annuities for Claims Court judges.

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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dicial Conference Asks for More Judgeships, pproves New Marshals Service Security Plan

The Judicial Conference of the ited States, meeting in Washington September, asked Congress to create v judgeships and approved three asures relating to the use of video ipment for certain limited purposes ted to court business.

The Conference voted to ask Con- ss to create 14 new court of appeals geships and 37 permanent and 22 porary district court judgeships. is request supersedes the nference's 1986 request to create 40 manent and 16 temporary district rt judgeships and 13 permanent rt of appeals judgeships (see *The Third Branch*, November 1986, at 1, and June 1987, at 5). If diversity jurisdiction were to be eliminated, the Conference request would be reduced.

The Conference also acted on the following measures:

• Approved a proposal of the U.S. Marshals Service to improve judicial security by installing video equipment in certain courtrooms. The equipment will be installed in approximately 10 or 12 courtrooms in order to monitor the proceedings in high-risk trials, with the approval of the presiding

See JUDICIAL CONFERENCE, page 8

mnibus Court Reform Bill Supported by JCUS, milar Bill Under Senate Consideration

H.R. 4807, an omnibus court reform introduced by Rep. Robert Kasten- ier, was passed by the House. The , a revised version of an earlier bill, ntains numerous provisions re- sted by the Judicial Conference of United States (see *The Third Branch*, October 1987, at 1). Before the vote on the bill, Rep. Kastenmeier read a letter from Chief Justice Rehnquist expressing both the Judicial Conference's and his personal support for H.R. 4807.

Among the bill's provisions are titles that would

• amend the rulemaking process;

• expressly authorize court-annexed arbitration in N.D. Cal., D. Conn., M.D. Fla., W.D. Mich., W.D. Mo., D.N.J., E.D.N.Y., S.D.N.Y., M.D.N.C., W.D. Okla., E.D. Pa., S.D. Tex., W.D. Tex, and in 10 additional judicial districts that will be approved by the Judicial Conference. The title also contains limitations on the type of actions that may not be referred to arbitration without consent of the parties; authorization of the taxation of arbitrator fees and attorneys' fees as costs to the party demanding a trial de novo, subject to certain conditions; standards for the certification of arbitrators; and a requirement that the Federal Judicial Center conduct an impact analysis of the court-annexed

See LEGISLATION, page 7

S. Magistrate Robert B. Collings (D. ass.) speaks on civil litigation at the FJC minar for newly appointed magistrates in ashington, D.C. See page 4 inside.

Chief Justice Addresses Australian Bar on Evolution of Legal Profession in the U.S.

Chief Justice Rehnquist, in a speech to the Australian Bar Association, discussed changes that have taken place in the legal profession during the last 35 years, stating that the "tremendous increase in terms of real dollars in the cost of litigation in our country during that period of time, while perhaps a boon to the profession in the short run, is not a positive development." He suggested that simpler, less time-consuming procedures than the full-scale jury trial, "while they may lose something in the pursuit of a totally accurate reconstruction of events, may more than make up for this lack by the reduction of costs and delays."

The last 35 years have seen the evolution of the practice of law from a profession to a business, the Chief Justice remarked. When he began to practice law, there were slightly over 200,000 lawyers practicing in the United States, whereas now there are about 700,000, he observed. Such growth has been "out of all proportion to the growth of population in our country." Developments have resulted in a profession "far more open to women and minorities" than it formerly was, that has become more

See CHIEF JUSTICE, page 3

Inside . . .

Telephone Access to Court Electronic Records Tested In D.D.C. 2

FJC Releases Report On Local Court Rules 2

JCUS Advisory Committees on Rules to Meet in November 5

New Method for Computerized Access to Case Information Via Telephone Tested in D.D.C.

A method for permitting the public to have remote access to computerized case docket information via telephone is being tested in the U.S. District Court for the District of Columbia. Installation of the public dial-in access package, which was developed by Federal Judicial Center staff, recently began. During the initial phase of testing, Center staff and the Clerk of Court invited a limited number of law firms and other interested parties to use this service; use by larger numbers of persons will follow.

The system, called PACER (Public Access to Court Electronic Records), permits users to look up a case by either litigant name or case number and retrieve the full electronic docket for the case. Users must have either a 1200 or 2400 baud modem and a terminal or personal computer (or other computer). They may save the electronic dockets on their own computers or print them out in their own offices.

Users can retrieve the entire electronic docket of a typical case in less than 30 seconds. They can also find out in less than a minute if anything has happened to a case and can research case involvements by name—for example, locating all cases in which ABC Manufacturing is a litigant. Before installation of the system, users were only able to access electronic docket information by visiting the court in person to use one of two public terminals at the court.

"This project has tremendous promise for improving the way that attorneys have access to court data. I see enormous potential benefits not only for attorneys but for the court," said James F. Davey, Clerk of Court of the U.S. District Court for the District of Columbia.

The PACER system will be implemented in the D.C. court in two phases. During Phase I, access will be afforded during normal business hours and participation will be limited to a small group of users; analysts from the FJC will be in contact with each user to get immediate feedback, answer any questions, and watch for and correct technical problems with the software. During Phase 2, the system will be opened to a larger group of users and will be available almost 24 hours a day. The court provides users with documentation and an ID/password, and use of the system is presently offered free of charge.

PACER includes an "idle time" limit that causes the system to "complain" if the user pauses for too long without doing anything. During the initial phase of testing, PACER also limits sessions to 10 minutes, in fairness to other users of the system's single line. At the D.C. court, civil cases opened before 1986 are generally not available with this service; criminal case dockets will be added early next year.

PACER will be tested on a pilot basis in additional district, bankruptcy, and circuit courts later this year or next year. The FJC will review user comments and suggestions in refining the system for possible nationwide distribution. Further information about PACER is available from John Hillenbrand or Mike Greenwood of the Center's Information and Systems Development Division, tel. 202/633-6400.

PACER is part of several pilot projects under way at the FJC. Following the completion of development of several large-scale court automation systems (AIMS, BANCAP, and CIVIL), the FJC has turned its attention to exploring and testing ways to provide the information collected in the court to information users. Projects currently being tested include a computer-generated voice-synthesis system (the Voice Case Information System) that is answering 120,000 information requests annually in three bankruptcy courts (see *The Third Branch*, August 1988, at 1) and a touch-screen system in use in the District of Columbia (see *The Third Branch*, September 1988, at 3). ■

"This project has tremendous promise for improving the way that attorneys have access to court data." *James F. Davey, Clerk of Court, D.D.C.*

Center Releases Publication on Revision of Local Court Rules

The Center has announced the publication of *A Practical Guide to Revision of Local Court Rules* by Jeanne Johnson Bowden. The paper was written to facilitate the rules revision process in other trial courts by sharing the experiences that the Northern District of Georgia had in revising its rules. That district undertook the total revision of its local court rules in January 1983. The project, led by the court's rules committee, lasted two years and involved all judges and magistrates on the court, the clerk of court, his deputy clerks, and his assistants. The rules were reviewed by court personnel, government and private attorneys, and the Administrative Office.

The paper is intended to be a "how-to-do-it" presentation. It does not address the philosophical considerations that influence the content of specific rules in the nation's trial courts. Separate sections are devoted to such topics as the decision to revise rules, organizing the rules committee, meetings, organization of court rules, drafting the rules, and printing and publishing them.

Copies of the paper are available by writing Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed, franked mailing label, but do not send an envelope. The report weighs 9 oz.

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

ERSONNEL

RCUIT JUDGES
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rdinand E. Fernandez, 9th Cir., Sept. 16
mination Withdrawn
rnard H. Siegan, 9th Cir., Sept. 16

STRICT JUDGES
vation
hard C. Erwin, Chief Judge, M.D.N.C., Aug. 20

IEF JUSTICE, from page 1

presentative of the whole popula-n. While there is "no question that gal services are available to many ople today to whom they were not ailable 35 years ago, particularly or people and criminal defendants," e system as it exists today "particu-ly ill-serves the large middle class" cause of the dramatic rise in the cost legal services in the United States d because of delays, the Chief Jus-e said.

Those concerned with the admini-ation of justice are coming increas-gly to realize that a full-dress jury l is a costly form of justice, perhaps ll suited on the criminal side to the udication of serious felony charges d perhaps well suited on the civil e to litigation between two corpo-e giants." For small businessmen, orcing couples, and "parties to merous other disputes who are not ficiently poor to receive the benefit egal assistance and not sufficiently ll-off to be able to pay the going e for attorney's fees," alternative pute resolution procedures such as itration, mediation, and summary trial can provide a "far simpler, expensive procedure which, while king some of the virtues of the ersary system of justice as prac-d in our courts, has some very nificant virtues of its own," the ef Justice said.

Copies of the Chief Justice's speech available from Information Serv-, 1520 H St., Washington, DC 05. Please send a self-addressed ling label, but do not send an elope. ■

JCUS Committee on the Bicentennial of the U.S. Constitution Asks Each Circuit Judicial Conference To Make Bicentennial a Principal Theme

The Judicial Conference Committee on the Bicentennial of the Constitution, chaired by Judge Damon J. Keith (6th Cir.), is urging that the celebration of the "200th Birthday of the Federal Courts" and the adoption of the Bill of Rights be the principal themes at each circuit judicial conference in 1989. The Committee has obtained a bibliography of the Judiciary Act of 1789, which created the first federal court system, and hopes to assemble a roster of speakers who will be available to address the circuit judicial conferences on the history and future of the federal courts and the Bill of Rights. The Committee also encourages other local programs commemorating these bicentennials and the display of "200th Birthday" banners on federal courthouses in 1989.

Pictured above are the Committee members and staff who attended the July meeting in Charlottesville, Va. (Front row, left to right) William R. Burchill, Jr. (General Counsel, Administrative Office), Judge Dolores Sloviter (3d Cir.), Judge Damon J. Keith, Chairman (6th Cir.), Judge Helen Nies (Fed. Cir.), Judge James Noland (S.D. Ind.), Judge J. Harvie Wilkinson III (4th Cir.); (Rear, left to right) Christopher Reynolds, Esq., John Chastain (Assistant General Counsel, Administrative Office), Judge W. Brevard Hand (S.D. Ala.), Judge Jaime Pieras (D.P.R.), Judge Adrian Duplantier (E.D. La.). Judge Kenneth Starr (D.C. Cir.) attended but is not pictured.

Other committee members are Supreme Court Justice Harry A. Blackmun, Retired Chief Justice Warren E. Burger, Judge Arthur L. Alarcon (9th Cir.), Judge Frank X. Altimari (2d Cir.), Chief Justice Edward F. Hennessey (Supreme Judicial Court of Mass.), Judge Patrick F. Kelly (D. Kan.), Judge James H. Meredith (E.D. Mo.), and Chief Judge Robert C. Murphy (Md. Court of Appeals). ■

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

Brazil, Wayne D. "Protecting the Confidentiality of Settlement Negotiations." 39 *Hastings L.J.* 955 (1988).

"Criminal Defense for the Poor, 1986." Bureau of Justice Statistics, 1988.

Elliott, Philip C. "A Judge's Thoughts About Criminal Instructions." 5 *Cooley L. Rev.* 23 (1988).

Grunes, Allen P. "Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?" 38 *Case Western Reserve L. Rev.* 387 (1987-88).

√Kastenmeier, Robert W. "Remarks on Presentation of the Justice Award." American Judicature Society, Toronto, Canada, Aug. 5, 1988.

Katzmann, Robert A. (ed.). *Judges and Legislators: Toward Institutional Comity.* Brookings Institution, 1988.

Laurence, Robert. "Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act." 10 *Campbell L. Rev.* 411 (1988).

Mallen, Ronald E. "Judicial Sanctions 1988." 17 *Memphis State University L. Rev.* 483 (1987).

Martineau, Robert J. "Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse." 1988 *Brigham Young University L. Rev.* 1.

Mills, Richard H. "Commentaries: To the New Lawyer." 12 *Southern Illinois University L.J.* 285 (1987).

1988 Survey of Books Relating to the Law. 86 *Michigan L. Rev.* 1067 (1988).

Noseda, James D. "Limiting Off-Bench Expressions: Striking a Balance Between Accountability and Independence." 36 *DePaul L. Rev.* 519 (1987).

√Powell, Lewis F., Jr. "Capital Punishment." Speech to the Criminal Justice Section, ABA, Toronto, Canada, Aug. 7, 1988.

Prentice, Robert A. "Reforming Punitive Damages: The Judicial Bargaining Concept." 7 *Rev. of Litigation* 113 (1988).

"Proceedings—Center for Public Resources Legal Program, May 1988." 6 *Alternatives to the High Cost of Litigation* 131 (August 1988).

√Rehnquist, William H. "The Old Order Changeth." Remarks before the Australian Bar Association, Sydney, Australia, Sept. 3, 1988.

Rosenberg, Maurice. "Resolving D putes Differently: Adieu to Adversary J tice?" 21 *Creighton L. Rev.* 801 (1987).

Schiller, Stephen A., and Peter M Manikas. "Criminal Courts and Local L gal Culture." 36 *DePaul L. Rev.* 327 (1987

Seventeenth Annual Review of Crim nal Procedure: United States Suprem Court and Courts of Appeals 1986-87. 7 *Georgetown L.J.* 521 (1988).

Untereiner, Alan E. "A Uniform Ap proach to Rule 11 Sanctions." 97 *Yale L* 901 (1988).

Wright, R. George. "Judicial Respons to Long-Term Societal Decline." 30 *Arizon L. Rev.* 271 (1988).

The Center held an orientation seminar for U.S. magistrates at the Dolley Madison House last month. Among those magistrates in attendance were (first row, left to right) Robert Holter (D. Mont.), Paul Greene (N.D. Ala.), Timothy Greeley (W.D. Mich.), James Graham (S.D. Ga.); (second row, left to right) Deborah Robinson (D.D.C.), Sue Robinson (D. Del.), Joseph Scoville (W.D. Mich.), John Simon (W.D. La.), and G.R. Smith (S.D. Ga.).

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Charles W. Nihan, Deputy Director

NOTEWORTHY

Nonparty witness may not invoke statute providing for disqualification of judge. Nonparty witnesses who ought to have a judge recused had no standing to invoke 28 U.S.C. § 455, the disqualification statute, the Third Circuit has held. *U.S. v. Sciarra*, 851 F.2d 21 (3d Cir. 1988), *rehearing and rehearing en banc denied*. The petitioners who sought the judge's recusal were former members of the executive board of a local union that was put under trusteeship pursuant to a 1984 decision of the U.S. District Court for the District of New Jersey. In 1987 the government, relying on the 1984 judgment and on RICO, sought to depose the petitioners. The government stated that the petitioners' testimony might form the predicate for additional relief necessary to prevent future racketeering violations involving the local union. The petitioners argued that the district court did not have authority to compel them to submit to oral depositions given their compliance with the 1984 judgment and that the judge should be disqualified pursuant to 28 U.S.C. 455(a) and (b)(1). The judge denied the motion for recusal and held that the petitioners could be required to give testimony.

On appeal, the Third Circuit held that petitioners were, at this point, only nonparty witnesses to an investigation rather than parties to an actual case or controversy; that the district court's discovery order was appealable under 28 U.S.C. § 1291 notwithstanding petitioners' failure to incur a contempt order; that the government had standing to seek petitioners' depositions; and that the district court had power to compel them as nonparty witnesses to submit to oral depositions absent the institution of a criminal or civil proceeding. As to the issue of petitioners' standing to challenge the judge's impartiality under 28 U.S.C. § 455, the appellate court reviewed the case law and legislative history and read the section as applying to the judge's participation in decisions affecting the substantive rights of litigants to an actual case or controversy. Since there was "no pending action before [the district judge] in which the rights of the petitioners are at issue," the appellate court held that "the petitioners have no standing to invoke section 455 in their capacity as non-party witnesses." The petitioners "have not sustained an 'actual injury' within the meaning of Article III," it said. Moreover, the depositions were not in the context of a substantive proceeding against a third party, nor were the petitioners being asked to provide privileged information. Should an adversarial action before the district judge be instituted that is designed to modify or alter the substantive rights of the petitioners, petitioners could then invoke section 455, the appellate court said.

Newspaper-intervenor cannot compel party to terminated case to provide access to documents no longer within district court's supervisory power, Third Circuit holds. Where exhibits admitted into the judicial record during a trial were restored to their owner after a case was terminated, a newspaper could not compel the owner to give it access to the documents, as the documents were no longer in the district court's "supervisory power," the Third Circuit has held. *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988). The materials were initially discovered under the aegis of a protective order under Fed. R. Civ. P. 26(c) requiring confidentiality and were later admitted into evidence at an open civil trial of a products liability action. A jury found the defendant liable for the plaintiff's injuries. The defendant settled the case before trial of the damages issue, and the settled action was dismissed. The original exhibits and deposition transcripts introduced at trial were returned to defense counsel after the settlement, in accordance with the court's administrative practice and in conformance with the protective order.

A newspaper subsequently filed a motion for intervention in the action and sought access to the trial record after the defendant refused to make available any evidence designated confidential under the protective order. The district court permitted the newspaper to intervene and granted it access to the judicial record, which was held to include depositions and

See NOTEWORTHY, page 6

JCUS Advisory Committees On Civil and Criminal Rules Meet in November

The Judicial Conference Advisory Committee on Civil Rules will meet Nov. 17–19 and the Advisory Committee on Criminal Rules will meet Nov. 17–18. Both meetings will take place in the courthouse of the Fifth Circuit Court of Appeals at 600 Camp St. in New Orleans. The Advisory Committee on Criminal Rules will meet in the East Robing Room (Room 228) and the Advisory Committee on Civil Rules will meet in the West Robing Room (Room 258). Meetings will start at approximately 9 a.m.

The public will be admitted to the meetings as observers, but will not be permitted to participate. Oral comments will not be received from visitors.

CALENDAR

Oct. 2–4 Metropolitan District Chief Judges Conference
Oct. 3–5 Workshop for Judges of the Sixth Circuit
Oct. 12–14 Workshop for Judges of the Eleventh Circuit
Oct. 17–19 Workshop for Judges of the Seventh Circuit
Oct. 17–21 Orientation Seminar for New Probation/Pretrial Officers
Oct. 24–26 National Seminar for Judges of U.S. Courts of Appeals
Oct. 31–Nov. 2 Workshop for Judges of the Fifth Circuit
Oct. 31–Nov. 3 Workshop for New Training Coordinators

NOTEWORTHY, from page 5

exhibits that had been admitted into evidence. The district court held, and the appellate court affirmed, that the defendant had waived whatever rights to confidentiality the protective order had created by failing to object to the documents' admission into evidence at trial. The defendant argued that the exhibits admitted into evidence lost their status as judicial records when they were returned to their owner after the case had been closed. The district court held that the fact that the exhibits and depositions were withdrawn by counsel after trial and settlement did not destroy their character as public records.

On appeal by the defendant in the products liability suit, the appellate court noted that at the time the newspaper first sought access to the judicial record, the underlying case had long been settled, no appeal was pending, and the contested exhibits had been returned to counsel. Moreover, under a local rule of court, if the exhibits had not been returned, they would already have been subject to destruction by the district court clerk. "Must a court be forever burdened with the responsibility of maintaining, supervising the possession of, or adjudicating access rights to, such documentary exhibits? We believe not. This is an unreasonable burden to inflict upon courts, particularly at a time when litigation continues to grow more complex and voluminous." Thus, on these facts, the exhibits were "no longer judicial records within the 'supervisory power' of the district court [citation omitted]. Neither the first amendment nor the common law right of public access empowers the district court to require that litigants return such exhibits to the court for the purposes of copy and inspection by third parties." The appellate court emphasized that the newspaper did have a right of access to "items that properly remained part of the judicial record, such as the deposition testimony read into evidence at trial or exhibits or portions thereof transcribed and made part of the official transcript." 851 F.2d at 683.

Press does not have First Amendment right to attend summary jury trial, Sixth Circuit holds. *Cincinnati Gas & Electric Co. v. General Electric Co.*, No. 87-3950 (6th Cir. Aug. 18, 1988). Three electric utility companies undertook jointly to build a nuclear power plant. They sued General Electric and an engineering firm over a contract dispute. The parties negotiated a comprehensive protective order applying to much of the material produced in discovery, which the magistrate approved. The district court issued an order requiring the parties to participate in a summary jury trial closed to the press and public. A newspaper moved to intervene in the action for the limited purpose of challenging the order closing the summary trial. The court denied the motion, holding that there is no First Amendment right of access because there is no tradition of access to settlement devices, including summary jury trials, and public access would not be significant to the functioning of the nonbinding summary trial. Following the summary trial, the parties settled. The newspaper appealed the district court's order concerning confidentiality of the summary jury process, arguing that the summary jury proceeding is analogous to a trial on the merits and therefore should be subject to the First Amendment right of access, and that public access would play a significant positive role in the functioning of the judicial system and summary trials.

The Sixth Circuit rejected the newspaper's arguments and affirmed the judgment of the district court. There is no historically recognized right of access to summary jury trials, the appellate court held. Moreover, the summary jury trial is "designed to facilitate pretrial settlement of the litigation, much like a settlement conference," and "does not present any matter for adjudication by the court." "[W]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement," and thus, "public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device," the appellate court held. "[T]he public would have no entitle-

See NOTEWORTHY, page 7

Positions Available

Librarian, Supreme Court of the United States. The librarian is responsible for the management of the Supreme Court library. Responsibilities include general supervision of 22 employees, management of a collection of approximately 250,000 volumes, budgeting, procurement, space planning, and management of automated information systems. Law degree and advanced degree in library science preferred. A minimum of 6 years of progressively more responsible law library experience is required. Management experience, competence with automated information systems, strong interpersonal skills, and budgeting experience are all required. Salary commensurate with qualifications and experience. Closing date Oct. 14, 1988. Send SF 171 to Personnel Office, Supreme Court of the United States, Room 3, Washington, DC 20543. Tel. 202/479-3404.

Clerk of Court, S.D. Ill., East St. Louis, IL. Salary from $54,907 to $71,377. Under direction of Chief Judge, manages administrative activities of the office and oversees performance of the office's statutory duties. Applicants must have a minimum of 10 years of progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility. Bachelor's degree may be substituted for 3 years of the required experience; postgraduate degree in public, business, or judicial administration for 1 additional year of experience; and law degree for 2 additional years. Law practice may be substituted year for year for the required management or general experience. Applications accepted until position filled; starting date Mar. 20, 1989. Submit applications and resumes to A. Marvin Helart, Clerk, U.S. District Court, Southern District of Illinois, P.O. Box 249, East St. Louis, IL 62202.

EQUAL OPPORTUNITY EMPLOYERS

OTEWORTHY, from page 6

ıent to observe any negotiations lead-ıg to a traditional settlement, . . . and ıe parties would be under no cons-tutional obligation to reveal the con-ent of the negotiations. Thus, the ublic has no first amendment right to ccess to the summary jury trial." ■

EGISLATION, from page 1

rbitration conducted under the act.

• amend 28 U.S.C. to create a federal ıultiparty, multiforum basis for juris-iction; this provision is intended to elp in consolidating mass disaster liti-ation;

• amend 28 U.S.C. to adjust the mount required for diversity jurisdic-on from $10,000 to $50,000;

• amend the Federal Judicial Center tatute, including the creation of a Fed-ral Judicial Center Foundation that ould be authorized to accept gifts or ervices for the purpose of aiding the ork of the Center;

• expand the availability of court terpreter services to grand jury pro-eedings and authorize circuit judicial ouncils to identify the need for certifi-ation of a language on a regional ba-s;

• affect jury selection and service rocedures, and include provisions aking it easier for the clerk or his or er designate to excuse jurors;

• make procedural reforms to the arter of the State Justice Institute, nd reauthorize the Institute for one dditional year;

• eliminate the Board of Certifica-on procedure for circuit executives.

In a related matter, the Senate Judi-ary Committee's Subcommittee on ourts and Administrative Practice et to mark up S. 1482, a bill intro-uced by that subcommittee's chair-an, Sen. Howell Heflin. S. 1482 is sim-ar in some respects to H.R. 4807 (see *he Third Branch*, August 1987, at 5).

The following measures before Con-ess are also of interest to the judici-y.

• Sen. Orrin Hatch (R-Utah) intro-uced S. 2747, which would provide ederal court authority to enforce rights secured by the Indian Civil Rights Act of 1968. Sen. Hatch said that his bill "strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act."

From 1968 to 1978, the Indian Civil Rights Act was routinely enforced in both tribal and federal courts, but federal court review came to an end with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which held that the act does not provide for a waiver of sovereign immunity and that it fails to provide a private right of action for individuals in federal court. Sen. Hatch quoted from decisions of the Eighth and Tenth Circuits and the District of Montana expressing concerns over the failure of some tribal governments to adequately enforce rights, and noted reports of serious complaints that have gone unreviewed by the federal courts due to the *Santa Clara* holding. S. 2747 would provide for federal court review and enforcement after an individual has exhausted his or her tribal remedies and would prohibit the defense of sovereign immunity in civil rights cases. Whenever a question of tribal law is at issue, the federal court would be required to "accord due deference" to the tribal court's interpretation of tribal laws and customs.

• Rep. Bill Grant (D-Fla.) introduced H.R. 5217, which would reform the procedures for collateral review of criminal judgments. The bill would establish a three-year time limit for criminal defendants to apply for writs of habeas corpus in federal court, but only if the defendant has had access to private counsel or an approved state-funded legal assistance program.

• The House on Sept. 22 passed H.R. 5210, the Omnibus Drug Initiative Act, as amended. The House had voted Sept. 8 in favor of an amendment offered by Rep. George W. Gekas (R-Pa.) to the bill that would permit imposition of the death penalty on anyone who kills in the course of a violation of federal drug laws. Under the amendment, if judges did not impose the death sentence on convicted defendants, they would be required to impose a sentence of 20 years to life. The Senate has previously approved a bill that would provide for the possible imposition of the death penalty in drug-related killings of law enforcement officers and in cases where "drug kingpins" order killings (see *The Third Branch*, July 1988, at 7).

The House in considering H.R. 5210 also approved an amendment offered by Rep. Daniel E. Lungren (R-Cal.) that would expand the exclusionary rule "good faith" exception to warrantless searches in drug cases. The House also voted in favor of a "user accountability" provision that would deny to convicted drug users certain federal benefits, such as student loans and occupancy in public housing.

• The House Veterans' Affairs Committee held a hearing on H.R. 639, the Veterans' Administration Adjudication Procedure and Judicial Review Act; S. 11, the Veterans' Administration Adjudication Procedure and Judicial Review Act; and S. 2292, the Veteran's Judicial Review Act. A bill was then reported by the House Veterans' Affairs Committee and referred to the House Judiciary Committee for further consideration. If this bill is ultimately signed into law without amendment, it would create an Article I court. Judge Morris S. Arnold (W.D. Ark.) testified on behalf of the Judicial Conference. Judge Arnold and Judge Stephen S. Breyer (1st Cir.) have previously testified before the Senate Committee on Veterans' Affairs that the Conference supports judicial review of constitutional issues and statutory interpretations only and opposes judicial review of any factual determinations of the Veterans' Administration (see *The Third Branch*, June 1988, at 2).

• The House passed S. 1934, the bill to provide for a judiciary office building that will house the Administrative Office of the U.S. Courts and the Federal Judicial Center and provide chambers for retired Supreme Court Justices. ■

JUDICIAL CONFERENCE, from page 1

judge. No tape recordings will be made.

• Approved an experimental program of videotaping as a means of taking the official record of court proceedings, and designated the Chair of the Committee on Judicial Improvements to seek approval of the Director of the Federal Judicial Center to design, conduct, and evaluate the program.

• Approved an experimental program of videoconferencing of prisoner civil rights and habeas corpus cases.

• Approved recommendations of the Committee on Defender Services, including budget authorizations for certain Federal Public Defender Organizations; sustaining grants to 12 death penalty resource center/community defender organizations; use of funds for certain expert services; and the incorporation into the guidelines for administration of the Criminal Justice Act of several measures contained in the recent American Bar Association resolution concerning representation in death penalty federal habeas corpus cases.

• Endorsed H.R. 4358 (the Federal Employees Liability Reform and Tort Compensation Act of 1988) and H.R. 4612 to make the Federal Tort Claims Act the exclusive remedy for common-law tort claims against federal officers and employees.

• Approved recommended priorities for funding death penalty resource centers/community defender organizations and other CJA programs.

• Delegated to the Defender Services Committee authority to approve revised grant requests of death penalty resource center/community defender organizations in limited amounts.

• Established a "special" alternative rate for death penalty habeas corpus cases in three districts.

• Authorized the Committee on Criminal Law and Probation Administration to promulgate guidelines for probation and pretrial services officers in relation to investigating and supervising offenders who have been exposed to the human immunodeficiency virus (HIV) or who have contracted AIDS. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 20
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NOVEMBER 1988

Judicial Improvements Bill Raises Diversity Amount, Creates Court Study Committee

Congress has passed the Judicial mprovements and Access to Justice Act, H.R. 4807, which, if signed by President Reagan, will bring some ignificant changes to the federal ourts. Some of those changes are as ollows:

Diversity jurisdiction. The mount in controversy in diversity ases is raised from $10,000 to 50,000.

For purposes of establishing diersity, the representative of an esate of an infant or an incompetent hall be deemed to be a citizen only f the same state as the infant or ncompetent.

For diversity purposes, an alien dmitted to the United States for ermanent residence shall be eemed to be a citizen of the state in which he or she is domiciled.

Federal Courts Study Committee. The Act creates a committee to study the future of the federal judiciary. The committee's purpose is to examine special issues before the courts, to develop a long-range plan with emphasis on alternative dispute structure and on administration of the federal courts, and other related matters. It will make a report to the President, the Chief Justice, the Judicial Conference, Congress, the Conference of Chief Justices, and the State Justice Institute, who will use it to consider, evaluate, and recommend possible revisions of specific federal laws. The report is to be transmitted by Mar. 31, 1990.

The committee will be composed of 15 members, to be appointed by the Chief Justice by Jan. 10, 1989. He is to designate the chairperson of the committee and all members are to serve at his pleasure. The committee is authorized to hold hearings.

See COMMITTEE, page 6

New Judiciary Office Building Legislation Signed by President Reagan

President Reagan has signed the udiciary Office Building Developnent Act, Pub. L. No. 100-480, auhorizing construction of a judiciary ffice building adjacent to Union tation in the District of Columbia. This new 520,000 square foot buildng will permit consolidating into ne location closer to the Supreme Court building over 700 personnel of he Administrative Office of the U.S. Courts, Federal Judicial Center, and thers of the judicial branch now in ight Washington, D.C., locations.

In addition to the AO and the FJC, pace in the building is designated or retired Supreme Court Justices nd for other offices necessary to the dicial branch. The Chief Justice is uthorized to decide how to use any pace in excess of judicial requirenents.

The new building will be constructed at the builder's expense on land already owned by the federal government and space will be provided to the judiciary under a 30-year lease. At the end of the lease term, title to the building will revert to the government. Rentals under the lease are expected to save around $500 million compared to present and projected commercial space alternatives.

The Act establishes a 13-member Commission to supervise the design, construction, care, and security of the building. The Architect of the Capitol, under the supervision of the Commission, is directed to select among five competing development proposals within 90 days of the Act. The Chief Justice is given final au-

See JUDICIARY BUILDING, page 8

President Signs FY89 Judiciary Appropriation

Judiciary's FY89 appropriation bill passed the House and Senate on Sept. 27 and was signed by the President on Sept. 30. The judiciary had requested $1,721,933,000; Congress approved $1,398,973,000, a reduction of $322,960,000 from the request but an increase of $69,039,000, or 5.2 percent, over FY88. At the budget summit, which took place in fall 1987, the executive branch and the legislative branch committed themselves to limit appropriations in FY89 over FY88 to only a 2 percent increase. The judiciary fell far short of its request and significantly short of an increase of $168,000,000 needed to fund judiciary operations at current levels with no provision for workload increases.

On May 21, the full House Appropriations Committee reported out the FY89 appropriations bill for Commerce, Justice, State, the judiciary and related agencies, and gave the judiciary an increase of $128,712,000, or 10 percent, over the FY88 appropriations. The Senate Appropriations Committee met on June 18 and approved only a $30 million increase over the FY88 appropriations enacted. The Conference Committee met Sept. 23 and

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FEDERAL DEPOSITORY

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First National Appellate Judicial Conference Held

Almost 170 judges of the U.S. courts of appeals, including 90 percent of those in active status, convened in Washington, D.C., Oct. 24 to 26, for the Federal Judicial Center's national conference on the federal appellate judiciary in the third century of the United States. Judge John C. Godbold, FJC Director, announced the meeting as a conference "to examine the role of the federal appellate judiciary and to consider ways in which that role might be performed in the future." The event marked the first time in the history of the Republic that all federal appellate judges were able to meet with one another.

The conference emphasized topics of federal appellate jurisdiction allocation, of jurisdiction between the federal judicial system and the state courts and administrative agencies. There was discussion of internal appellate operating procedures, judicial governance, and relations with the political branches.

Chief Justice William H. Rehnquist opened the conference. Justice Byron R. White participated in the session on maintaining uniformity in federal law in the future. Justice William J. Brennan, Jr. closed the meeting.

The FJC's Appellate Education Committee, which planned the conference, is comprised of Judges Jon O. Newman (2d Cir.), *Chairman;* Daniel M. Friedman (Fed. Cir.); James K. Logan (10th Cir.); and Kenneth W. Starr (D.C. Cir).

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Co-editors

Alice O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

FJC Reports Preliminary Results of Survey On Personal Computer Use in Federal Courts

The Center's Innovations and Systems Development Division has conducted a survey of personal computer usage in the federal courts. This survey sought to

- identify the tasks being performed on PCs;
- identify software packages being utilized;
- identify functions not yet automated but which the courts feel should be automated; and
- assess the courts' need for PC training and support.

The survey was sent to the chief judge and the clerk of each federal court, and through them to each chambers and each support office (e.g., staff attorney, library, probation, and public defender) within the court.

A total of 973 survey responses were received from 165 different courts: 680 from chambers, 163 from clerks, and 130 from other offices.

The average respondent reported that availability of a PC is "very important" and that PCs provide "great benefit" to the court.

The volume of the response indicates the courts' high degree of interest in personal computer utilization. The average respondent reported that availability of a PC is "very important" and that PCs provide "great benefit" to the court.

Tasks performed on court PCs. The responses indicate that the courts' PCs are currently being widely used for word processing, accessing other automated systems such as LEXIS and WESTLAW, case management, and calendar management. They are also being used for property inventory control, personnel information, jury management, financial management, and many other functions.

Software utilized on court PCs. Respondents reported nearly 100 commercial software packages that are being used in the courts and approximately 125 additional PC software packages specially developed by or for the courts.

Recommended commercial software packages include 16 utility packages (disk maintenance, backups, etc.), 14 word processing packages, 12 database packages, plus local area network packages, communications packages, and spreadsheet packages.

Of the 14 word processing packages recommended, WordPerfect received 231 recommendations whereas the next most popular package received only eight.

Court-developed systems include 28 case management systems, 18 financial management systems, 13 calendar systems, 10 personnel and leave systems, 10 property inventory systems, 10 index systems (e.g., case list, attorney list), plus statistical reporting systems, jury systems, and federal records center systems.

Commercial products in each category do not share equal popularity in the courts. For example, of the 14 word processing packages recommended, WordPerfect received 231 recommendations whereas the next most popular package received only eight.

The AO's soon-to-be-awarded PC procurement for the courts includes the selection of one word processing package, one database package, one communications package, and one spreadsheet package. Those selections should lead to an increase standardization of commercial software packages used in the courts.

See PC SURVEY, page 7

Bankruptcy Judges, Magistrates Gain New Benefits; New Bankruptcy Judgeships Created

Culminating two years of effort, the House adopted S. 1630, the Retirement and Survivors Annuities for Bankruptcy Judges and Magistrates Act of 1988, on Oct. 19, 1988. The Act's provisions include the following:

- One may retire at full salary at age 65 after 14 years of service;
- Leaving office before age 65 reduces benefits by 2 percent per year, up to a total reduction of 20 percent, and the pension still could not be drawn until age 65;
- For those with more than eight but less than 14 years of service, the pension is reduced proportionally;
- A contribution of 1 percent of salary per year for 14 years is required;
- Retirement for disability after five years qualifies for 40 percent of benefits; after 10 years the benefit is proportioned in relation to the 14-year predicate;
- Retirees forfeit annuities if they subsequently practice law, but by first notifying the AO of their intention to do so they can preserve the annuity less future COLAs;
- COLAs are available, not to exceed the pay of sitting judicial officers;
- Benefit options include annuities and lump-sum disbursement; incumbent judicial officers will wish to explore the alternative options under title 5 and § 377 of title 28;
- There is no survivor's pension, but one can buy into a survivor's annuity program;
- Survivors of annuitants will receive lump-sum balances if the principal dies before receiving the annuity or before the annuity totals the lump-sum amount, and thereafter they will receive the accrued and owing amount;
- A thrift savings plan has been created, permitting judicial officers covered by 28 U.S.C. § 377 to contribute up to 5 percent of their base pay;
- The AO Director is charged to report to Congress in five years on the financial operation of the annuity program, the contributions, and the need for continuing deductions.

In support of the Act, Rep. Carlos Moorhead reminded the House that, since the Bankruptcy Reform Act of 1978, bankruptcy judges and magistrates had been losing ground both on salary and on retirement benefits, prompting a high rate of turnover. Rep. Moorhead stated that, as the ideal federal judicial officer was a veteran of considerable legal practice and experience, it was necessary to augment the rewards for such service to attract appointees later in their legal careers and to discourage early retirement in contemplation of subsequent legal practice.

On a related matter, on Nov. 3 the President signed H.R. 4064, which authorizes seven new bankruptcy judgeships, four of them recommendations of the Judicial Conference, to respond to greatly increased caseloads. They are in the Districts of Alaska, Colorado, Kansas, Arizona, the Eastern District of Kentucky, and the Eastern District and Western District of Texas.

Effective Oct. 1, bankruptcy judges and full-time magistrates received salary increases from $72,500 to $82,340, which will first appear in the November paycheck. ■

CALENDAR

Nov. 2–4 Federal Circuit Court Librarians

Nov. 2–4 Video Orientation for Newly Appointed District Judges

Nov. 14–16 Seminar for Bankruptcy Judges

Nov. 14–16 Seminar for District Deputies-in-Charge

Nov. 27–Dec. 2 Seminar for Newly Appointed District Judges

Nov. 29–Dec. 2 Workshop for Docketing Supervisors

PERSONNEL

CIRCUIT JUDGES

Confirmation

John M. Duhe, Jr., 5th Cir., Oct. 14

DISTRICT JUDGES

Confirmations

Lewis T. Babcock, D. Colo., Oct. 14
Paul V. Gadola, E.D. Mich., Oct. 14
Robert Leon Jordan, E.D. Tenn., Oct. 14
Alex R. Munson, N. Mar. I., Oct. 14
Norwood Carlton Tilley, Jr., M.D.N.C., Oct. 14
Richard L. Voorhees, W.D.N.C., Oct. 14
Jay C. Waldman, E.D. Pa., Oct. 14

Appointments

Simeon Timothy Lake III, S.D. Tex., Sept. 2
Jan E. Dubois, E.D. Pa., Sept. 6
Herbert J. Hutton, E.D. Pa., Sept. 6
Fern M. Smith, N.D. Cal., Sept. 12
Chas. R. Butler, Jr., S.D. Ala., Nov. 1
D. Brooks Smith, W.D. Pa., Nov. 1

Senior Status

G. Wix Unthank, E.D. Ky., June 14
Hiram H. Ward, M.D.N.C., Aug. 20
Robert F. Peckham, N.D. Cal., Nov. 10

Deaths

William J. Campbell, Senior District Judge, N.D. Ill., Oct. 19
Edward T. Gignoux, Senior District Judge, D. Me., Nov. 4

BANKRUPTCY JUDGES

Appointment

Ronald B. King, W.D. Tex., Oct 1

Elevation

Larry E. Kelly, W.D. Tex., Oct. 1

Resignation

R. Glen Ayers, Jr., W.D. Tex., Sept. 30

MAGISTRATES—FULL-TIME

Appointments

John T. Maughmer, W.D. Mo., Sept. 29
James H. Payne, E.D. Okla., Oct. 1
David M. Cohen, D. Minn., Oct. 11

Congress Approves Arbitration in Selected Districts; AO, FJC to Report on Implementation

Provisions of the Federal Courts Improvements and Access to Justice Act, H.R. 4807, authorize ten U.S. district courts to use arbitration. Authorized courts are N.D. Cal., M.D. Fla., W.D. Mich., W.D. Mo., D.N.J., E.D.N.Y., M.D.N.C., W.D. Okla., E.D. Pa., and W.D. Tex. The Act is awaiting the President's signature.

The Act stipulates that these districts may authorize arbitration of any civil action (including any adversary proceeding in bankruptcy) if the parties consent, and may require arbitration of any civil action (except an alleged violation of a constitutional right or one based on jurisdiction under 28 U.S.C. § 1343) if the relief sought consists only of money damages not in excess of $100,000, or a lesser amount the district court may set (exclusive of interest and costs). Ten additional judicial districts may be approved by the Judicial Conference of the United States to authorize arbitration of any civil action if (and only if) the parties consent.

The district court is to establish procedures by local rule; including those for the exemption, sua sponte or on motion, of cases where complex or novel legal issues are involved or where legal issues predominate over factual issues.

Each district court participating in the arbitration program is to establish standards for the certification of arbitrators.

Within 30 days after the filing of an arbitration award with a district court any party may file a written demand for a trial de novo, and upon such a demand the action shall be restored to the docket.

A further provision states that the district court shall provide by local rule that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case. There are three exceptions: (1) when it is necessary for the court to determine whether to assess costs or attorney fees; (2) when the district court has entered final judgment in the action or the action has been otherwise terminated; and (3) when it is necessary to use the information to compile the Annual Report of the Director of the AO.

The Judicial Conference may develop model rules relating to procedures for arbitration.

The AO Director is to include in his Annual Report statistical information about the implementation of this program. The FJC, no later than five years after the date of enactment, is to submit to Congress a report on the implementation of the program, including (1) a description of the program; (2) a determination of the "level of satisfaction"; (3) a summary of program features that can be identified as being related to acceptance within and across judicial districts; (4) a description of the levels of satisfaction relative to the cost per hearing; and (5) recommendations to Congress whether to terminate or continue this or alternative arbitration procedures. ■

Judges from China Visit AO and FJC

A delegation from the Chinese Training Center for Senior Judges visited the Administrative Office of the U.S. Courts and the Federal Judicial Center last month as part of a Ford Foundation program on U.S.–China relations. The delegation will be visiting several cities and law-related institutions to secure a better understanding of the American judicial system at the federal, state, and local levels. Their interests covered a broad area of court administration and the role of the U.S. Department of Justice, with primary emphasis on observing and discussing judicial training.

China's Judicial Training Center was started in early 1988 as the country's principal institution for the preparation of judges for the bench.

Pictured above are (l. to r.) Zhao Zhenjiang, Professor and Dean, Peking University Law School, Beijing; Wang Zenong, State Commission on Higher Education and member of the Committee of the Training Center for Senior Judges at Beijing; Zhou Daoluan, Justice of the Supreme People's Court of the People's Republic of China and leader of the delegation; Gu Chun De, Dean of the Department of Law, People's University of China; and Wang Chenguang, Deputy Dean of the Law Department, Peking University.

Rules Enabling Act Provisions Revised, Consolidated

In title IV of the recently passed Judicial Improvements and Access to Justice Act, H.R. 4807, Congress amended the Rules Enabling Act to consolidate all the current rules enabling provisions into chapter 131 of 28 U.S.C. and standardize the language applicable to the rules process. The amendments codify the current standing committee, advisory committee, and Judicial Conference roles in the rules process developed over 40 years, and require public notice and opportunity to comment, and public meetings under most circumstances. The Supreme Court must transmit proposed rules to Congress no later than May 1 of the year in which the rules are to become effective. The rules would take effect no earlier than Dec. 1 of that year (unless otherwise provided by law).

In addition, the changes provide that each federal court authorized to prescribe rules under 28 U.S.C. § 2071 (except the Supreme Court) shall appoint an advisory committee to study the rules and internal operating procedures of such court;

The amendments also provide that:

•The Director of the Administrative Office of the U.S. Courts shall periodically compile the following: (1) local rules promulgated by courts other than the Supreme Court, (2) rules promulgated by the judicial councils and the Judicial Conference of the United States for the conduct of judicial discipline proceedings under 28 U.S.C. § 372(c)(11), and (3) orders relating to judicial discipline required to be publicly available under 28 U.S.C. § 372(c)(15);

•The Judicial Conference shall periodically review local rules promulgated by the courts of appeals, the Claims Court, and the Court of International Trade, and is authorized to modify or abrogate any such local rule found inconsistent with federal law (amending 28 U.S.C. § 331);

•The relevant judicial council shall periodically review local district court rules for consistency with the national rules;

•Local rules duly issued shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit or the Judicial Conference, as applicable;

•Local rules shall be promulgated only after advance public notice and opportunity for comment. General orders issued by judicial councils related to practice and procedure, as well as judicial discipline rules, must also be preceded by appropriate notice and opportunity for comment;

•Copies of local rules and general orders relating to practice and procedure shall be furnished to the Judicial Conference and the AO and be made available to the public. ■

Quadrennial Commission Holds Judicial Compensation Hearings in Washington, D.C.

The 1988 Quadrennial Commission on Executive, Legislative, and Judicial Salaries held public hearings on judicial compensation in Washington, D.C. Nov. 10 and 11.

Members of the Commission are appointed by the President, the Chief Justice,and members of the House of Representatives, and the Senate. The members of the Commission are Lloyd N. Cutler, *Chairman* (Attorney, Washington, D.C.); William M. Agee (Chairman and CEO, Morrison-Knudsen Co., Boise, Idaho); Preston R. Tisch (President and CEO, Loews Corp., New York, N.Y.); James T. Lynn (Chairman, Aetna Life & Casualty, Hartford, Conn.); Carlisle Humelsine (Chairman, Colonial Williamsburg Foundation, Williamsburg, Va.); John J. Creedon (President and CEO, Metropolitan Life Insurance Co., New York, N.Y.); William R. Ratchford (Attorney, Washington, D.C.); Thomas F. Eagleton (Attorney, St. Louis, Mo.); Charles McC. Mathias (Attorney, Washington, D.C.).

NOTEWORTHY

Anonymous jury permissible, Third Circuit holds. The empanelment of an anonymous jury was justified in a case involving a reputed organized crime figure, where prosecution witnesses claimed that a prospective witness had been killed in the past, a judge murdered, and attempts made to bribe other judges, the Third Circuit has held. *U.S. v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988).

In the extortion trial of the alleged "boss" of an organized crime group, the district judge granted the government's motion to empanel an anonymous jury. During voir dire neither party was permitted to learn the prospective jurors' names, addresses, or places of employment. The prospective jurors completed an extensive written questionnaire on such topics as the nature of their employment, neighborhoods, education, reading and television tastes, organization memberships, hobbies, previous service as jurors in criminal cases, and connections to law enforcement agencies. The judge personally examined the prospective jurors and permitted further questioning by counsel. The judge told the jurors that they would be selected on an anonymous basis and sequestered, and emphasized that anonymity was intended to protect the interests of both prosecution and defense. The defendant was con-

See NOTEWORTHY, page 7

Positions Available

Technical Assistant, Fed. Cir. Duties include reviewing briefs and panel-approved opinions for publication, assisting with evaluation reports, advising judges and law clerks on legal or technical matters, researching technological and legal matters, and preparing research memos. Work includes patent issues. Minimum requirements are undergraduate degree in or related to electrical engineering or electronic technology and J.D. or LL.B. Admission to a bar and experience in intellectual property law, engineering, or high technology desirable. Open until filled. Send SF-171 and résumé to Senior Technical Assistant, U.S. Court of Appeals, 717 Madison Pl., N.W., Washington, DC 20439.

Clerk, Bankr. Ct., S.D. Cal. Provides all administrative support service required by the court. Supervises 56 personnel and provides support services to four judges. Requires at least 10 years of progressively responsible management experience, thorough understanding of automation concepts and applications. Undergraduate degree in public or business administration and graduate or law degree preferred (graduate or law degree may be substituted for two years of required experience). Entry level, salary $67,038 per year. Submit SF-171 and detailed résumé and references by Dec. 1, 1988, to Personnel, Clerk of the Court, U.S. Bankruptcy Court, 940 Front St., Room 5N26, San Diego, CA 92189.

Clerk, Bankr. Ct., S.D. Ind. Requires a minimum of 10 years of progressively responsible administrative experience, at least three in position of substantial management responsibility. Active practice of law may be substituted on a year-for-year basis, and education may be substituted as follows: bachelor's degree equals three years; postgraduate degree in public, business, or judicial administration equals one additional year; law degree equals two additional years. Law degree, legal practice, and training or experience in judicial administration highly desirable. Salary range $46,679 to $72,000. Send four sets of résumé and cover letter by Dec. 31 to Chief Bankruptcy Judge Robert L. Bayt, Room 317-A, U.S. Courthouse, 46 E. Ohio St., Indianapolis, IN 46204.

Clerk, Bankr. Ct., E.D. Mo. Headquartered in St. Louis, the court has three bankruptcy judges, their staffs, and 28 deputy clerks. Applicant should have at least 10 years of progressive management experience, including three with significant responsibility; thorough understanding of modern management techniques, including utilization of automation; and interest in judicial management. Undergraduate degree preferred, and graduate/legal degree in business or public administration or legal practice experience may be substituted for some of experience requirement. Salary $57,158 to $74,303, effective January 1989. Submit SF-171, resume, and application letter by Dec. 30, 1988, in sealed envelope marked "Confidential 88-4" to William D. Rund, Clerk, U.S. Bankruptcy Court, 1114 Market St., Room 730, St. Louis, MO 63101.

Clerk, Bankr. Ct., W.D. Mich. Manages the office under direction of the chief judge. Must have minimum 10 years of progressively responsible administrative experience in public service or business, at least three with substantial management responsibility. Bachelor's degree may be substituted for three such years; postgraduate degree in public, business, or judicial administration for one additional year; a law degree for two additional years; and legal practice experience substituted year for year. Salary from $54,907 to $71,377. Submit SF-171 and detailed résumé by Dec. 31, 1988, to Sheila Kooistra, U.S. Bankruptcy Court, P.O. Box 3310, Grand Rapids, MI 49501.

Official Court Interpreter (Spanish/English), S.D.N.Y. Duties include interpreting for the court and related offices in various proceedings, translating written documents, and transcribing tape-recorded conversations. Requirements: Certification from the AO, at least two years of experience, extensive experience in simultaneous interpretation using electronic equipment and in consecutive mode, plus the interpersonal skills for dealing with defendants, witnesses, court personnel, the bar, and the general public. Experience must be documented in the submission. Salary from $25,226 to $33,218 annually; 120-day probationary period. Submit application to Personnel Office, U.S. Courthouse, Room 21, 40 Centre St., New York, NY 10007.

EQUAL OPPORTUNITY EMPLOYERS

COMMITTEE, from page 1

The Act specifies that the Administrative Office of the U.S. Courts, the Federal Judicial Center, "and each department, agency, and instrumentality of the executive branch of the Government, including the National Institute of Justice shall furnish the Committee information and assistance" that the committee may deem necessary to carry out its functions. The Director of the AO is designated to furnish staff and technical assistance. The committee is also authorized to appoint advisory panels, including members of the public, to support the committee with expertise in specific areas.

The Act specifies that the committee will cease to exist 60 days after it transmits its final report.

An amount of $300,000 is authorized for each of the fiscal years 1989 and 1990.

Salaries of the judges of the U.S. Claims Court, through an amendment to title X of H.R. 4807, were established at the same rate of pay as judges of the U.S. district courts.

In another title of H.R. 4807, there was congressional action on arbitration programs; these changes are detailed on p. 4 of this issue. ■

NOTEWORTHY, from page 5

victed of conspiracy and extortion.

The defendant claimed on appeal that the jury selection procedure impaired his right to exercise peremptory challenges and infringed on the presumption of innocence. The appellate court noted that because 'voir dire is not of constitutional dimension, limitations affecting peremptory challenges need not be reviewed with the close scrutiny reserved for encroachments on the fundamental rights of an accused." Although the issue was one of first impression in the circuit, the court reviewed case law from other federal district and circuit courts and concluded that "defendant was not deprived of information reasonably necessary to the intelligent exercise of his peremptory challenges" and that the trial judge had not abused his discretion in empaneling an anonymous jury. The court distinguished this from the rule in capital cases, citing 18 U.S.C. § 3432. The appellate court also found that the trial judge's instructions adequately protected the defendant from possible adverse inferences by the jurors, and affirmed the conviction.

Department of Justice reported that 1987 personal and household crimes numbered 34.7 million, representing a 1.8 percent increase over 1986. In 1986 about 34.1 million personal and household crimes were reported, said the Bureau of Justice Statistics on Oct. 9, 1988. This is the first increase in crimes since 1981; the 1987 figure is still 16 percent less than in 1981. Single copies of the National Crime Survey bulletin "Criminal Victimization, 1987" (NCJ-113587), may be obtained from the Criminal Justice Clearinghouse, Box 6000, Rockville, MD 20850, (tel. (301) 251-5550; from outside Maryland and Washington, D.C. (800) 732-3277).

Juror utilization report issued. The AO has issued the quarterly report on juror utilization for the 12-month period ending June 30, 1988. Copies have been sent to all clerks of the courts. ■

PC SURVEY, from page 2

Nevertheless, some functions are not covered by those products and some courts will continue to have their own commercial software preferences.

The large number of court-developed systems designed to serve the same function (e.g., 28 case management systems) creates a need to devise some standard, objective criteria for describing and comparing those systems. The I&SD Division is in the process of collecting information for those standard descriptions and compiling it into a catalog for use by the courts. The catalog, which is expected to be available to courts by the end of the year in both electronic and print form, will contain information regarding both the commercial packages and the court-developed systems that have been used and recommended by the courts. The catalog will be supplemented by a software clearinghouse facility for those court-developed systems made available for general dissemination.

Functions not yet provided on PCs. Respondents listed numerous functions that they would like to perform on their PCs but could not, because of a lack of software or expertise. Some of those functions have already been developed by other courts, and the catalog should facilitate the sharing of that software.

Courts' need for PC training and support. Most respondents felt that their past training, level of knowledge, and adequacy of expert assistance fell in the middle of a scale ranging from "unacceptable" to "excellent." Many reported that they were self-taught, and many, while praising the experts who assist them, complained that they had no expert who was readily available. They indicated a need for both additional PC training and additional expert assistance.

The AO's upcoming PC procurement will include training programs for some aspects of PC usage. In addition, the I&SD Division, through its Automation Training Project, will be working to make the Center's Media Library more beneficial to PC users and to develop additional training curricula for PC support personnel.

Further information about the survey is available from Gary Bockweg of the Innovations and Systems Development Division, tel. (202) 633-6400. ■

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APPROPRIATIONS, from page 1
resolved the differences between the Senate and the House bills by appropriating the $69 million increase. Under the appropriation, the AO received an appropriation of $33,600,000 for "salaries and expenses"; the FJC received $11,200,000 for "salaries and expenses."

In addition, however, the Committee supplemented the judiciary's new budget authority by registry funds held by the courts. (A 1 percent fee would raise about $15 million.) The Conference Committee also authorized funding the judiciary for up to $1.5 million from the Vaccine Injury Fund for one year to process vaccine injury cases, and authorized the establishment of death penalty habeas corpus resource centers in South Carolina, Alabama, Arizona, Mississippi, and Texas.

Although the judiciary's appropriation fell far short of its request, the Commerce Department appropriation (excluding funds for the Periodic Census and the National Oceanic and Atmospheric Administration) was increased only 1.9 percent, the Justice Department only 2.8 percent (excluding Prisons), and the State Department only 1.6 percent. Finally, the legislative branch increased its budget authority by only 3.4 percent. During the closing days of the 100th Congress, action on the FY89 drug supplemental was completed. The judiciary received an additional $51 million in new budget authority for drug-related programs, which was allocated among the following accounts: "salaries and expenses," $35 million; "defender services," $15 million; "fees of jurors and commissioners," $1 million. In addition, funding was included in Defender Services for establishing additional death penalty habeas corpus resource centers in California, Florida, Kentucky, North Carolina, and Oklahoma.

The Executive Committee of the Judicial Conference met Oct. 26 at the AO and approved a spending plan for the operation of the courts based on the appropriations approved for FY89. The plan, which distributes available funding among all the judiciary programs and activities, represents a consensus arrived at among the chairmen of the Judicial Conference committees whose programs are affected by the budget and the chairman of the Budget Committee. ■

JUDICIARY BUILDING, from page 1
thority over all decisions in the process. The Commission is to be composed of the following individuals or their designees:

- two members from among the Justices of the Supreme Court and other federal judges, to be appointed by the Chief Justice;
- the members of the House Office Building Commission;
- the Majority Leader and the Minority Leader of the Senate;
- the Chairman and the ranking minority member of the Senate Committee on Rules and Administration;
- the Chairman and the ranking minority member of the Senate Committee on Environment and Public Works;
- the Chairman and the ranking minority member of the House Committee on Public Works and Transportation.

The Commission will be responsible for the rules and regulations formulated under the Act governing the use and occupancy of the building. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

VOLUME 20
NUMBER 12
DECEMBER 1988

A Holiday Message from The Chief Justice

It is my pleasure to extend to all of the members of the federal court "family" my best wishes for a happy holiday season.

As we reflect on the past year, there is much for which we can be thankful and from which we can take satisfaction. First and foremost, the confirmation of Justice Anthony Kennedy brought the Supreme Court back to full strength. After laboring for many months with only eight members, we have all benefitted immeasurably from Justice Kennedy's ability and congeniality.

This past fall, the first nationwide conference of Judges of the United States Courts of Appeals was held in Washington, D.C. These judges had the opportunity to consider the future of the federal courts and the challenges likely to be presented in coming years. For some of the judges, it was their first opportunity to meet many of their colleagues. I have no doubt that the shop-talk and personal exchanges which took place will benefit the federal courts in the years to come.

At this holiday season, I would like to be able to report that 1988 also saw an appropriate rise in the salaries of federal judges. Unfortunately, such action has not yet occurred, and the federal judiciary remains undercompensated in comparison with the rest of the legal profession. As we look to the new year, we are hopeful that in light of the recommendations of the President's Salary Commission a suitable increase in judicial salaries will soon be forthcoming.

I thank each of you for your good efforts during the past year and look forward to working with you in 1989. Mrs. Rehnquist joins me in extending to you and to your families best wishes for a Merry Christmas and a Happy New Year.

Sincerely,

William H Rehnquist

Veterans' Judicial Review Act Creates New Court of Veterans Appeals

Veterans gained the right to judicial review from final decisions of the Board of Veterans Appeals and limited payment of contingent attorneys' fees under S. 11 (Pub. L. No. 100-687), the Veterans' Judicial Review Act, which President Reagan signed Nov. 18. The Act establishes a U.S. Court of Veterans Appeals with exclusive jurisdiction to review decisions of the Board of Veterans' Appeals and to affirm, modify, reverse, or remand, as appropriate. The scope of appeal will include:

- the power to decide relevant questions of law; constitutional, statutory, and regulatory interpretation; and meaning and applicability of actions of the Administrator;
- the power to compel acts of the Administrator that have been withheld;
- the power to set aside findings of fact and hold them unlawful if clearly erroneous;
- the power to hold unlawful certain other findings, decisions,

See VETERANS APPEALS COURT, p. 6

Quadrennial Commission Witnesses Support Increased Judicial Compensation

In hearings held Nov. 10 and 11 in Washington, D.C., the Quadrennial Commission on Executive, Legislative and Judicial Salaries heard from numerous witnesses with distinguished records of public service, all advocating increased compensation for federal judges, executives and legislators.

Judge Frank M. Coffin (1st Cir.), Chairman of the Committee on the Judicial Branch of the Judicial Conference of the United States, presented a report entitled *Promises Made, Promises Still Unkept*, which set out historical and comparative data that he described as "the most complete judicial branch submission in the two decades of Quadrennial Commission activity." The report focused on questionnaire responses from 638 of the 710 active judges. All respondents described financial strictures compared with private sector income levels, and many detailed hardships on families and referred to erosion of purchasing power over time. Many also noted that outside income and assets, part-time teaching, and debt underwrote their standard of living. One said that he felt he was "inflicting a life of genteel poverty upon his family in order to be a federal judge." Younger judges—with children to educate

See QUADRENNIAL COMMISSION, p. 8

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U.S. Marshals Service Designated a Bureau in Department of Justice on Eve of 200th Year

The U.S. Marshals Service has been statutorily designated a bureau within the Department of Justice, rather than a collection of relatively autonomous district offices, as had been the case for 200 years. Beginning at § 7608, the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, streamlines, modernizes, and consolidates related existing statutory provisions, providing explicit authority for functions the marshals and their deputies have in the past traditionally performed.

Although the office of U.S. marshal was created by act of the 1st Congress on Sept. 24, 1789, the Marshals Service has until now existed only by order of the Attorney General.

The legislation, originally introduced as a separate bill that was endorsed by the Judicial Conference of the United States last March, spells out the authority and duties of the Marshals Service, restating its traditional and primary responsibility for providing security for the federal courts and executing court orders. It also authorizes the Service to provide personal protection to judges, witnesses, and other threatened persons in connection with judicial processes and other official proceedings. Law enforcement officers of the Service are now provided with specific authority to conduct investigations of fugitives and to provide for the custody, care, and transportation of unsentenced federal prisoners in Service custody. All these responsibilities, together with the management and disposal of seized criminal assets, have become more burdensome with the increase in drug cases.

Marshals Service Director Stanley E. Morris pointed out, "The new provisions respond to several concerns of the Judicial Conference. It gives the Marshals Service authority to enter personal services contracts for security guards, permitting more efficient use of funds appropriated to the courts' security needs. In addition, it removes the unrealistic $6 per day limit on court bailiff salaries without fixing the salary level or otherwise affecting the courts' appropriations."

The current system of presidential appointment of U.S. marshals with the advice and consent of the Senate is retained, with the same method used to designate the Director of the Service. However, temporary vacancies in the office of marshal will now be filled by the Attorney General rather than by the district court.

A key feature designed to strengthen the administration of justice in the District of Columbia is creation of the new Office of Marshal for the Superior Court of the District of Columbia. The services provided to the D.C. Superior Court are vastly different from those for other federal district and circuit courts, and the Marshals Service district in that court has the greatest number of personnel of any district. The new office is intended to ensure meeting the unique needs of the District of Columbia.

In a related action, Congress adopted a resolution to declare Sept. 24, 1989, as "United States Marshals Bicentennial Day" and asked the President to issue a proclamation to that effect. Director Morris said that one of the first events celebrating the Service's bicentennial will be the opening on Dec. 9 of a special Smithsonian Institution exhibit in the U.S. Supreme Court Building entitled *America's Star: U.S. Marshals, 1789-1989*. The exhibit will be shown in 12 cities in the United States after its Washington, D.C., debut. ■

Spanish/English Interpreting Certification Test Set

The Administrative Office has announced a Mar. 4, 1989, written examination for Spanish/English interpreters, the first step of the certification process established pursuant to the Court Interpreters Act of 1978, at 28 U.S.C. § 1827(b). Successful candidates from the written examination will be given the oral test in July or August 1989. Testing will be offered once in 1989 and only in certain cities.

The Act requires courts to use certified interpreters for all proceedings covered by the Act and permits use of otherwise competent but uncertified interpreters only if no certified interpreters are reasonably available.

Successful candidates will be placed on an eligibility list from which certified court interpreters may be chosen. Full-time, salaried interpreters, as of Jan. 1, 1989, will be designated as JSP-10 and JSP-11 (salary ranges $26,260-$37,509 annually). The freelance certified interpreter fee is $210 per day.

The AO has issued an examination announcement, which has been posted in federal judicial workplaces. It is also available through the University of Arizona Federal Court Interpreter Certification Project, Modern Languages Building, Room 456, University of Arizona, Tucson, Arizona 85721, or by telephoning them from 8 a.m. to 5 p.m. RMT at (602) 621-3687. The application fee is $25 and the deadline is Jan. 15, 1989.

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THE THIRD BRANCH

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Co-editors

Alice O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

Changes in Jury Service Exemptions, Excuses, As Jury Act Amendments Become Effective

The Jury Act of 1968 has been amended by title VIII of H.R. 4807, the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702, 102 Stat. 4642). (See *The Third Branch*, November 1988, for details of the rest of the Act.) The amendments became effective upon President Reagan's Nov. 19 signature of the Act, and they do the following:

- limit jury service exemptions to members of the armed services, federal and state public officers, and members of fire and police departments;
- authorize automatic excuses from jury duty for "public agency volunteer safety personnel" (firefighters, rescue squads, ambulance crews);
- permit temporary excuses on grounds of undue hardship, or extreme inconvenience;
- eliminate the requirement that jury lists be alphabetical;
- authorize delegation of jury selection functions to non-court personnel;
- authorize two-year experimental testing of one-step qualification and summoning in as many as 10 courts to be selected by the Judicial Conference of the United States.

The AO has disseminated copies of relevant portions of the Act with an analysis. David Williams in the Court Administration Division at FTS 633-6221 is available to answer questions on the volunteer safety personnel excuse. For general questions on title VIII, call Deputy General Counsel Robert Loesche at FTS 633-6127. ■

Rules Committee to Suggest Model Local Rules and Forms for U.S. District Courts

The Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure will review recommendations of its Local Rules Project at a meeting to be held in San Francisco Jan. 19-20, 1989, announced Judge Joseph F. Weis, Jr. (3d Cir.), Chairman. The Project will suggest, in addition to a uniform numbering system, some model local rules, illustrative forms, and other possible methods of reducing and simplifying local rules. Soon thereafter, the Committee plans to send the results of the Local Rules Project's study to each district court for information and comments. Judge Weis suggested that district courts that have begun a review of their local rules and those that contemplate doing so in the next few weeks might wish to await the Committee's report before proceeding on a review of their local rules.

Anti-Drug Abuse Act Creates New Office to Oversee Unified National Drug Strategy

Before adjournment the 100th Congress passed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, and President Reagan signed the Act on Nov. 19. As passed, it combines several separately introduced bills, some unconnected to substance abuse. The following are summaries of drug-related sections.

Coordinating national drug policy. The Act establishes an Office of National Drug Control Policy within the Executive Office of the President, to be headed by a Director appointed by the President subject to Senate confirmation. The Director is to organize U.S. resources into a single drug control strategy at the national level. Within 180 days of his or her confirmation, the Director must submit to Congress a "comprehensive, research-based, long-range plan" for reducing drug abuse in the United States. The plan must balance resources between reductions in supply and demand, must review state and local drug control activities to facilitate coordination at all levels, and must organize compatible automated information and communication systems among federal and other agencies. The Act requires the Director to submit yearly plans to implement the national strategy, and each plan submitted in the second and subsequent years shall evaluate the preceding plan's effectiveness.

Within a year of appointment, the Director shall submit a Justice Department reorganization plan, targeting these elements of the Criminal Division: the Organized Crime and Racketeering Section and all the strike forces; the Narcotics and Dangerous Drugs Section; the Asset Forfeiture Office; and the Organized Crime Drug Enforcement Task Force Program.

By Jan. 15, 1990, the Director must recommend to the President and Congress a plan for reorganizing other existing federal agencies for greater efficacy in reducing illegal drug supply and demand.

The Director is to designate high-intensity drug trafficking areas and provide federal assistance to the areas. By Mar. 1, 1991, he or she is to report to Congress the utility of such designations and the allocation of federal assistance to those areas, along with comments and any recommendations for legislation. The Director's broad authority includes power to review other agencies' staffing and budgets for adherence to the national strategy (agencies may appeal disapprovals to the President). The Director will report quarterly to Congress on needed programs or funds transfers. In presidential budgetary submissions to Congress, each requested appropriation for the Office of National Drug Control Policy and other programs is to be designated separately.

See ANTI-DRUG ABUSE ACT, p. 6

PERSONNEL

CIRCUIT JUDGES
Death
J. Skelly Wright, D.C., Aug. 6

DISTRICT JUDGES
Appointment
Alex Munson, D. N. Mar. I., Nov. 18

Senior Status
Almeric L. Christian, D.V.I., May 15
Scott Reed, E.D. Ky, Aug 1
Alfred Laureta, D. N. Mar. I., Nov. 19

Deaths
George Templar, D. Kan., Aug. 5
M. Joseph Blumenfeld, D. Conn., Nov. 5

BANKRUPTCY JUDGES
Appointments
Kathleen P. March, S.D. Cal., Nov. 10
J. Vincent Aug, Jr., S.D. Ohio, Dec. 1

Photo courtesy Pete Souza, The White House

Pictured above with President Reagan at the White House Sept. 21 are, left to right, Bankr. Judge William E. Anderson, W.D.Va.; Chief Bankr. Judge George C. Paine, II, M.D. Tenn.; President Reagan; Chief Bankr. Judge Charles N. Clevert, D. Wis.; and Chief Bankr. Judge Conrad B. Duberstein, E.D.N.Y. The bankruptcy judges discussed with President Reagan recent legislation and the current status and problems of the bankruptcy courts.

THE SOURCE

The publications listed below may be of interest to readers. Only those preceded by a checkmark are available from the Center. When ordering copies, please refer to the document's author and title or other description. Requests should be in writing, accompanied by a self-addressed mailing label, preferably franked (but do not send an envelope), and addressed to Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005.

Barber, Sotirios A. "Judicial Review and *The Federalist*." 55 *University of Chicago L. Rev.* 836 (1988).

Burnett, Arthur L., Sr. "U.S. Claims Court Practice," in *Intellectual Property Counseling & Litigation*, ch. 107 (Matthew Bender & Co., 1988).

Copple, Robert F. "From the Cloister to the Street: Judicial Ethics and Public Expression." 64 *Denver University L. Rev.* 549 (1988)

Eisenhower, James J., III. "Four Theories of Precedent and Its Role in Judicial Decisions." 61 *Temple L. Rev.* 871 (1988).

Everett, Robinson O. "FBA Fourth Circuit Conference Keynote Address." 35 *Federal Bar News & J.* 356 (1988).

Fratcher, William F. "The Independence of the Judiciary under the Constitution of 1787." 53 *Missouri L. Rev.* 1 (1988).

Hutton, Mary Christine. "The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases." 40 *Administrative L. Rev.* 377 (1988).

Kastenmeier, Robert W. "Let Ideas Flourish: How We Can Improve Our Justice System." 72 *Judicature* 122 (1988).

Lay, Donald P. Remarks at the Eighth Circuit Judicial Conference (July 14, 1988).

Luneberg, William V. "Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement." 1988 *Wisconsin L. Rev.* 1.

MacManus, Sheila. "Center Surveys JCO Complaint Disposition, Budget and Staff for 1986." 10 *Judicial Conduct Rep.* 1 (1988).

Posner, Richard A. *Law and Literature.* (Harvard Univ. Press 1988).

Wald, Patricia M., Mary McGowan Davis, Daniel J. Meltzer, John H. Pickering, and Newton N. Minow. "In Memoriam: Carl McGowan." 82 *Northwestern University L. Rev.* 213 (1988).

White, Byron R., Bernard G. Segal, George Clemon Freeman, Jr., David L. Westin. "Tributes to Associate Justice Lewis F. Powell, Jr. on the Occasion of His Retirement." *Supreme Court Historical Society Yearbook 1987* 1 (Summer 1987).

1989 Circuit Conferences

First	Nov. 13-15	Newport, RI
Second	Sept. 7-9	Lake George, NY
Third	Sept. 10-12	Pittsburgh, PA
Fourth	June 29-July 1	Hot Springs, VA
Fifth	May 7-10	New Orleans, LA
Sixth	May 10-12	Lexington, KY
Seventh	Apr. 30-May 2	Chicago, IL
Eighth	July 18-21	Minneapolis, MN
Ninth	July 9-14	Laguna Niguel, CA
Tenth	Sept. 6-8	Santa Fe, NM
Eleventh	May 7-10	New Orleans, LA
D.C.	June 4-6	Washington, DC
Federal	May 23	Washington, DC

NOTEWORTHY

Record numbers on parole or probation. The Justice Department has revealed that in 1987 the total of persons on probation or parole reached a record high of 2.6 million. Adults in the custody of a governmental entity, including those in federal, state, or local prisons and jails, numbered 3.4 million, or almost 2 percent of the nation's population. Three-fourths of these are being supervised in the community and about one-fourth are incarcerated.

Geographic differences were noted in probation growth patterns, with the Midwest leading in probationers with 8.7 percent, followed by the West with 8.6 percent, the Northeast with 5.7 percent, and the South with 3.8 percent. The federal probation population increase was 4.6 percent.

Parolee increases also varied geographically, with the West leading with 21.7 percent, followed by the South with 13.8 percent, the Midwest with 7.9 percent, and the Northeast with 3.1 percent. Texas and California had almost one-half the national increase in parolees. The federal parole population rose 6.2 percent.

The percentage of offenders released from state prisons on discretionary parole board decisions declined from 72 percent in 1977 to 41 percent in 1987, with an additional 31 percent of 1987 dischargees serving a period of supervision in the community

Second Circuit Committee reports on ADR. The Second Circuit Standing Committee on the Improvement of Civil Litigation, appointed by Chief Judge Wilfred Feinberg in 1986 and chaired by Standish Forde Medina, Jr., issued its report on "Settlement Practices in the Second Circuit" on Oct. 13. The Committee reported three conclusions: First, ADR techniques, raised at the right time, could assist parties in satisfactorily settling their disputes with less expense and delay than could proceeding to trial; second, judges have to educate litigants to get them to use ADR procedures; third, few judges have used or recommended the use of ADR mechanisms despite the effectiveness of such techniques.

The Committee report recommends that federal trial judges in the circuit make greater use of ADR techniques and that the judges become actively involved in educating parties about the availability of ADR processes. The Committee had four suggestions aimed at resolving these concerns: (1) that every judge raise the issue of settlement with the parties, offering the court's assistance and encouraging serious discussions, early and often thereafter, and shaping discovery to facilitate such discussions; (2) that every judge routinely advise litigants early in every civil case about the ADR procedures available to them, such as minitrials and summary jury trials, and distribute suggested guidelines and forms to use with the ADR procedures; (3) that there be formed a working group system of four to six judges, meeting regularly to coordinate their caseloads and discuss solutions to court operation problems; (4) that the Second Circuit Judicial Council consider a one-day retreat to encourage discussions of settlement techniques and related issues. ■

CALENDAR

Dec. 5–6 Judicial Conference Committee on Administration of the Magistrates System

Dec. 12–13 Orientation for New Assistant Federal Defenders

Dec. 12–13 Judicial Conference Committee on Court Security

Dec. 12–13 Judicial Conference Committee on the Administrative Office

Dec. 12–13 Judicial Conference Committee on Judicial Resources

Dec. 12–13 Judicial Conference Committee on Judicial Improvements

Dec. 12–13 Judicial Conference Committee on the Bicentennial of the Constitution

Positions Available

Director, Office of Staff Attorneys, 9th Cir. Supervises 50 employees, including 37 staff attorneys. Responsible for prebriefing conferences, coordinating motions practice, preparing case memoranda, drafting dispositions, and evaluating incoming cases. Requires 5 years legal experience; academic or court experience is preferred. Salary range begins at $57,158. Women and minority candidates encouraged to apply. For information call (415) 556-7361. Begins fall 1989. Résumé to Dinah Shelton, Director, Office of Staff Attorneys, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

Clerk, Bankr. Ct., S.D. Ind. Requires 10 years progressively responsible administrative experience, at least three in position of substantial management responsibility. Active law practice may substitute on year for year basis, and education may substitute for experience as follows: bachelor's degree equals three years; postgraduate degree in public, business, or judicial administration equals one additional year; law degree equals two additional years. Law degree, legal practice, and training or experience in judicial administration highly desirable. Salary from $46,679. Send four sets of résumé and cover letter by Dec. 31 to Chief Bankruptcy Judge Robert L. Bayt, Room 317-A, U.S. Courthouse, 46 E. Ohio St., Indianapolis, IN 46204.

Clerk, Bankr. Ct., W.D. Mich. Manages office under direction of the Chief Judge. Requires 10 years progressively responsible administrative experience in public service or business, three with substantial management responsibility. Bachelor's degree may substitute for three years; postgraduate degree in public, business, or judicial administration for one additional year; law degree for two additional years; and legal practice experience substituted year for year. Salary from $54,907. Résumé by Jan. 10, 1989, to Sheila Kooistra, U.S. Bankruptcy Court, P.O. Box 3310, Grand Rapids, MI 49501.

Asst. Reporter of Decisions, U.S. Supreme Court. Assists Reporter in preparing the *U.S. Reports* for publication and in supervising 8-person staff. Writes syllabuses; edits opinions for accuracy, format, and style; prepares indexes; and reads page proofs for editorial changes. Law degree; three years lawbook publishing experience, particularly at managerial level; thorough knowledge of federal and state law, legal research methods, and English grammar, punctuation, and spelling; and a demonstrated aptitude for legal writing are all required. Admission to a state bar, 5 years practical legal experience, and familiarity with computerized printing desirable. Salary SCP 13 to 15, depending on qualifications. Closing date Jan. 13, 1989. Send SF-171 to Personnel Office, Supreme Court of the United States, Washington, DC 20543. Tel. (202) 479-3404.

EQUAL OPPORTUNITY EMPLOYERS

VETERANS APPEALS COURT, from p. 1
conclusions, and rules and regulations of the Administrator, the Board, and the Board Chairman and to set them aside if found to be arbitrary, unconstitutional, extrajurisdictional, in excess of authority, or not in conformity with procedure.

The record will be the only basis for review. Trial de novo is not available. When a final decision of the Board is based solely upon the failure of the claimant to comply with regulations, the Court of Veterans Appeals can review only the validity of the regulation and the compliance issue. The schedule of ratings for disabilities adopted under § 355 of the Act is not reviewable on appeal.

Appellants may have counsel represent them before the court pursuant to rules of practice to be established, but fee agreements must be filed with the court when the appeal is filed. The court may review the fee agreement and affirm or issue an unappealable order for reduction.

The court will have contempt authority, with power to sanction via fines and imprisonment, and the same enforcement power over its orders and processes as other federal courts. All proceedings and records, except those found by the court to be confidential, shall be public records.

Appeals by parties adversely affected by final orders require filing a notice of appeal with the court within 120 days of mailing of the notice of the decision contested. The General Counsel's Office will represent the Administrator and defend appeals of decisions of the Board.

The Court of Veterans Appeals is to include in its decisions conclusions of law and findings of fact. Appeals may be heard by single judges or by panels, and in the event of a single-judge decision, the aggrieved party or the court may gain panel review of the decision upon motion. Decisions of the court become final upon running of the time for filing notice of appeal or, if notice is filed, upon running of the time to pursue the matter to conclusion.

The Federal Circuit has exclusive jurisdiction to review decisions of the court on questions of law and interpretation underlying the court's decisions, and intermediate controlling questions of law and interpretation in disagreement may be heard on interlocutory appeals. However, except for constitutional challenges, review of factual determinations or of law or regulations applied to the facts of a particular case are foreclosed. Otherwise, rules for review of decisions of the court shall be those prescribed by the Supreme Court under 28 U.S.C. § 2072.

The President is to nominate the chief judge of the Court of Veterans Appeals, subject to confirmation by the Senate, between Jan. 21 and Apr 1, 1989. After Feb. 1, 1989, the Pres dent may nominate two to six associate judges.

The Court of Veterans Appeals is an Article I court, with judges' terms of office set at 15 years and their compensation the same as U.S. district court judges. The chief judge is designated to head the court and to receive the same pay as judges of the U.S. courts of appeals.

Locating facilities for the new court is delegated to the Administrative Office, which is to consider the library, equipment, and personnel requirements plus resources available for shared use with other federal courts and agencies.

The Act amends provisions pertaining to the appointment of the Board of Veterans' Appeals; they now provide for appointment of the Board Chairman by the President with the consent of the Senate and the appointment of members of the Board by the Administrator with th approval of the President, to 9-year terms of office (staggered initially). The Board will avail claimants of hearing opportunities and shall base decisions upon the entire record.

Other provisions are effective Sept. 1, 1989, unless otherwise noted, and concern matters other than judicial review of benefit claims. ■

ANTI-DRUG ABUSE ACT, from p. 3
The Act also directs the Attorney General to ensure that civil statutes creating ancillary sanctions and remedies for drug law violations are given high priority and that increased field office legal and investigative staff are deployed. The Associate Attorney General is given responsibility for implementation, with an additional $6 million for salaries and expenses appropriated for the purpose, half earmarked for the U.S. attorneys.

The National Drug Enforcement Policy Board and White House Office of Drug Abuse Policy are terminated; the National Narcotics Act of 1984 is repealed.

Treatment and prevention programs. $1.5 million of the revised and extended alcohol, drug abuse, and mental health services block grants ($1.5 billion for FY89) allotted to the states on a demographic basis is authorized for law enforcement and judicial training. The Act promotes prevention and treatment of addiction, with set asides for treatment of women, children, and intravenous drug users. One goal is reduced waiting periods for treatment of alcohol and drug dependencies; another is testing model programs for pregnant women and women with infants. Special arrangements are provided for programs sponsored by the military and the Veterans Administration, for private sector employer, and for Native Americans. Funds under these provisions are not to be used to distribute or to clean needles or for basic AIDS research.

User accountability. Convicted possessors of and traffickers in controlled substances can be denied federal benefits at a court's discretion, including licenses, contracts, loans or grants (but not including

See ANTI-DRUG ABUSE ACT, p. 7

ANTI-DRUG ABUSE ACT, from p. 6

eterans', retirement, or Social Security benefits, welfare or disability, or obligations to Indians or Indian tribes). Federal contractors and grant recipients will have to comply with a new definition of "responsible source" under the Drug-Free Workplace Act of 1988, which mandates security, education, and sanctions for personnel who commit drug-abuse violations. Contractors and grantees who do not comply risk suspension, termination, or debarment. HUD grants for public housing are directed toward providing a drug-free environment, with enhanced security and education programs for management and tenants.

Money laundering. Money laundering controls were strengthened in the following ways: Businesses described by the Bank Secrecy Act, 31 U.S.C. § 5312(a)(2), as similar to financial institutions and under that Act's control now include those involved in vehicle, airplane, and boat sales and in real estate closings and settlements; the U.S. Postal Service; and any other business or agency that the Treasury adds by regulation whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. Another change facilitates prosecution for money laundering operations in which the target funds are in fact provided by law enforcement as part of an investigation. The Postal Service is authorized to investigate money laundering in cooperation with Justice and the Treasury.

Death penalty, other criminal and law enforcement matters. Two categories of defendants will face possible death penalties: those who kill as part of drug-related transactions and those who kill law enforcement officers during drug-trafficking activities. The death penalty is foreclosed to defendants who were under 18 when the crime was committed and to the mentally retarded or those who are unable to understand critical facts in the context of the circumstances or who are unable to convey that information to counsel or the court.

The jury, or the court in a non-jury trial, considering applying the death penalty must, in each case, issue findings on aggravating and mitigating factors. Aggravation must be found unanimously and beyond a reasonable doubt and may include such factors as defendant's prior criminal record, the brutality of the instant crime, whether the defendant was paid or paid another to commit the killing, whether the defendant intentionally killed the victim, and whether the defendant inflicted serious bodily harm on the victim. The existence of a mitigating factor may be established upon the finding of a single juror. Mitigating factors need only be proved by a preponderance of the evidence; aggravation must be weighed against mitigation. Even if there are no mitigating factors, any aggravation must be considered to determine if death is appropriate. Jurors must certify that the penalty was determined without regard to race, color, religion, national origin, or gender of the defendant or victim.

Guidelines require that well-qualified counsel are provided to indigent defendants for all stages of trial and appeal.

All death penalty cases are subject to review by the courts of appeals.

For defendants subject to the death penalty on whom the penalty is not imposed, the sentence range is 20 years to life imprisonment without the possibility of parole (amending 21 U.S.C. § 841).

The Act provides a mandatory life sentence for anyone convicted of a third felony drug offense, and related sections enhance penalties for offenses involving children or circumstances in which children were placed at risk of exposure to illegal drugs.

Supplemental appropriations. For the judiciary, judicial services salaries and expenses, $35 million; for defender services, $15 million; for fees of jurors and commissioners, $1 million. For associated programs: $7 million in salaries and expenses to the Bureau of Alcohol, Tobacco and Firearms; $8.5 million for the U.S. Customs Service salaries and expenses, and $7 million for operation and maintenance of the Air Interdiction Program; and $3.5 million for salaries and expenses for the new Office of National Drug Control Policy.

The AO is preparing a short summary of pertinent parts of the Anti-Drug Abuse Act of 1988 for distribution. ■

THE BOARD OF THE FEDERAL JUDICIAL CENTER

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QUADRENNIAL COMMISSION, from p. 1

and homes still mortgaged, not having had time to accumulate assets—particularly felt the need to reconsider a long-term commitment to the federal bench.

Philip W. Tone, President of the American College of Trial Lawyers and former judge of the Seventh Circuit, responded to Commission Chairman Lloyd N. Cutler's invitation to address three specific topics: (1) how judicial salaries and benefits compare with those at comparable private sector levels, (2) how judicial salaries and benefits have an impact on judicial morale and willingness to serve for life, and (3) permissible outside income-producing activities. As to salary comparability, Mr. Tone stated that there is a "dramatic difference" between judicial salaries and benefits and those for commensurate positions and a similar disparity in important collateral benefits (e.g., life insurance and survivors' benefits). He pointed out that private sector lawyers can utilize higher incomes and tax-deferred savings to amass substantial estates, while "the typical judge has little but his salary when he reaches retirement age," and the retirement costs must be paid by the judge. Mr. Tone discussed morale implications, which he described as severe; judges cannot fail to know how much more their contemporaries and own former law clerks earn in the private sector, and while they cannot expect to earn that much, they have a right to compensation reflecting the relative responsibility and importance to society of their contributions and their positions. Mr. Tone described low morale as a deterrent to obtaining and retaining the best lawyers for the federal bench. As to outside income, permissible sources are essentially teaching and writing, with "slim" remuneration. The caseload generally leaves no time or energy for such activities, and federal judges should not be dependent upon supplemental income.

James C. Miller III, past Director of the Office of Management and Budget, testified that most agencies could absorb the additional salaries costs he advocated in present budgetary configurations. He said that the additional costs would be quite modest compared with the total federal budget or even the amount spent for compensation, being on the order of a third of a billion dollars annually. His view was that by raising compensation government could attract and retain the best people and that the value received would far exceed the cost.

Many of the witnesses referred to the steadily rising rate of resignations from the federal bench, something once quite rare, and noted that more judges had resigned during the past 20 years than in the preceding 180 years. Judge Robert H. Hall (N.D. Ga.), President of the Federal Judges Association, said that he was concerned that continuation of the trend could lead to the federal judiciary becoming "a mere stepping stone" to a prestigious law firm partnership at several multiples of the judicial salary.

All testified in support of substantial increases in base compensation, from $135,000 to $150,000 for district court and special court judges to more than $200,000 for the Chief Justice. They also called for significant improvements in ancillary and survivors benefits, including payment of those costs by the government rather than the judge.

The Commission will report its findings and recommendations to the President this month. He can accept or modify them, and he is to forward recommendations to the Congress on Jan. 9, 1989. His proposals will take effect automatically in 30 days unless both houses of Congress reject them. ■

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